85-626

No.

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

ACCIDENT FUND, a Legal Entity
Authorized by the Michigan Legislature
Pursuant to 1912 PA 10 (First Extra Session)
Part V, §1, 1915 CL 5477, *et al.*,
Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance
of the State of Michigan, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Petitioners
By: Theodore W. Swift (P 21213)
David VanderHaagen (P 23169)
James D. Adkins (P 27746)
313 South Washington Square
Lansing, MI 48933
Telephone: (517) 372-8050

MICHIGAN STATE ACCIDENT FUND
By: Frank J. Nerat, Jr. (P 29140)
Assistant Manager and General Counsel
232 South Capitol Avenue
Lansing, MI 48933
Telephone: (517) 485-7193

Dated:
Oct. 11, 1985

THE AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

97pp

QUESTIONS PRESENTED FOR REVIEW

I. WHERE THE FEDERAL COURT ABSTAINED FROM DECIDING THIS CAUSE BASED UPON THE DOCTRINE SET FORTH IN *RAILROAD COMM'N v. PULLMAN CO.*, DID THE COURT ERR IN DISMISSING PETITIONERS' CLAIMS IN THEIR ENTIRETY?

II. IS ABSTENTION UNDER THE PRINCIPLES SET FORTH IN *RAILROAD COMM'N v. PULLMAN CO.* APPROPRIATE WHEN THE PARTIES TO THE ACTION, INCLUDING A STATE'S ATTORNEY GENERAL, HAVE STIPULATED TO FEDERAL COURT JURISDICTION AND WHERE THE STATE'S SUPREME COURT HAS REFUSED TO ADDRESS STATE LAW QUESTIONS CERTIFIED TO IT BY THE FEDERAL COURT?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
INDEX OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	
I. THE SIXTH CIRCUIT COURT OF APPEALS HAS FAILED TO DIRECT THE DISTRICT COURT TO RETAIN JURISDICTION OF PETITIONERS' FEDERAL CONSTITUTIONAL AND STATUTORY CLAIMS IN VIOLATION OF THE PRINCIPLES ESTABLISHED BY THIS COURT IN *RAILROAD COMM'N v. PULLMAN CO.* AND ITS PROGENY	5
A. *The Decision of the Court of Appeals Conflicts with Applicable Decisions of this Court*	5
B. *The Decision of The Court of Appeals Conflicts With The Decisions of The Courts of Appeal for Other Circuits*	7
C. *The Decision of the Court of Appeals Here Conflicts With Other Decisions of the Same Court*	8
II. ABSTENTION UNDER THE PULLMAN DOCTRINE IS INAPPROPRIATE WHERE THE STATE REQUESTS FEDERAL COURT INTERPRETATION OF STATE LAW QUESTIONS AND WHERE THE STATE SUPREME COURT REFUSES TO ADDRESS STATE LAW QUESTIONS CERTIFIED TO IT BY THE FEDERAL COURT UPON STIPULATION OF ALL PARTIES	10
RELIEF REQUESTED	15

INDEX OF AUTHORITIES

CASES: Page

Belotti v. Baird, 428 U.S. 132, 96 S. Ct. 2857, 49 L. Ed. 2d 844 (1976) 11, 12

Burford v. Sun Oil Co., 319 U.S. 315 63 S. Ct. 1098, 87 L. Ed 1424 (1943) 3

Carey v. Sugar, 425 U.S. 73, 96 S. Ct. 1208, 47 L. Ed. 2d 587 (1976) 6

Catrone v. Massachusetts State Racing Comm'n, 535 F.2d 669 (1st Cir. 1976) 7

Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) 10

D'Iorio v. County of Delaware, 592 F.2d 681 (3rd Cir. 1978)..... 7

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964) 6, 8, 13

414 Theater Corp. v. Murphy, 499 F.2d 1155, (2d Cir., 1974)..... 12

Harris County Commissioners Court v. Moore, 420 U.S. 77 n. 14, 95 S. Ct. 870, 43 L. Ed. 2d 32 (1975) 6

Harrison v. NAACP, 360 U.S. 167, 177, 3 L. Ed. 2d 1152, 1158, 79 S. Ct. 1025;..... 6, 7, 10, 11

Hostetter v. Idlewild Bon Voyage Liquor Corp. 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 350 (1964). 11, 14

Hull v. Petrillo, 439 F.2d 1184, 1188 (2d Cir., 1971)... 12

Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972)..... 13

Lister v. Lucey, 575 F.2d 1325 (7th Cir. 1978) 11

Louisiana P. & L. Co. v. Thibodaux, 360 U.S. at 29, 3 L. Ed. 2d at 1062 6

Pietzsch v. Mattox, 719 F.2d 129 (5th Cir. 1983) 7

INDEX OF AUTHORITIES—(Cont'd)

Cases:	Page
Professional Plan Examiners of New Jersey, Inc. v. LeFante, 750 F.2d 282, 290-291 (3rd Cir. 1984)	14
Railroad Comm'n v. Pullman, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 2d 971 (1941)	*passim*
Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).....	7
Traughber v. Beauchane, 760 F.2d 673 (6th Cir. 1985)	13
Tyler v. Collins, 709 F.2d 1106 (6th Cir. 1983)	8
United Service Life Insurance v. Delaney, 358 F.2d 714 (5th Cir., 1966).....	13
WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981)...	13
Zeigler v. Zeigler, 632 F.2d 535, 538 (5th Cir. 1980)..	7
Swickler v. Koota, 389 U.S. 241, 244 n. 4, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967)	6

STATUTES:

28 U.S.C. § 1254(1)	1
29 U.S.C. § 1001	1, 5
42 U.S.C. § 1983	5

CONSTITUTIONS:

U. S. Const., art I, § 10	5

OPINIONS BELOW

On January 9, 1984, the United States District Court for the Western District of Michigan issued an opinion from the bench determining that the claims then before the District Court should be dismissed in their entirety. This opinion was followed by a written opinion and judgment entered by the District Court on February 2, 1984. This Opinion and Judgment are unpublished.

Petitioners filed a timely appeal of the District Court's Opinion and Order and on June 26, 1985 the Court of Appeals for the Sixth Circuit issued a *per curiam* opinion affirming the District Court's reliance upon the abstention doctrine set forth in *Railroad Comm'n v. Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 2d 971 (1941). The Court of Appeals affirmed the District Court's judgment to abstain, but instructed the District Court to retain jurisdiction only over Petitioners' claims pled under the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. § 1001.

Petitioners filed a timely motion for rehearing requesting that pursuant to certain cited precedent, the District Court be directed to retain jurisdiction of all of Petitioners' claims. In addition to Petitioners' claims under ERISA, Petitioners had asserted other claims under various federal constitutional and statutory provisions. In an order entered July 17, 1985, the Court of Appeals declined to rehear the matter or alter its findings.

JURISDICTION

Jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1). The Court of Appeals Order of July 17, 1985 is a final judgment which has determined all of Petitioners' rights in this matter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioners' claims here turn on a number of federal constitutional and statutory provisions. Their resolution also requires the federal court to apply certain provisions of state law. For purposes of this Petition, however, no constitutional or statutory provisions need be construed.

Rather, the Court of Appeals' reliance upon this Court's decision in *Railroad Comm'n v. Pullman Co* is at issue since the doctrine set forth in that case constituted the sole basis for the Court of Appeals' Opinion below.

STATEMENT OF THE CASE

The Petitioner Accident Fund, is an organization offering insurance for workmen's disability compensation to employers in the State of Michigan. Its precise organizational and legal status is a contested issue between the parties.

On December 7, 1976, the Attorney General for the State of Michigan issued an opinion that challenged the Accident Fund's operation as an independent entity. Prior to this ruling, the Accident Fund had operated as an independent entity since its founding in 1912. After the Attorney General's opinion was issued, the Accident Fund and the State engaged in various legal and political "battles" over the continued manner of operation of the Accident Fund. The dispute between the parties eventually culminated in the instant action.

This action was filed on May 1, 1981. As can be seen from the District Court Docket Sheet set forth in the Appendix, substantial discovery and pretrial proceedings took place prior to the District Court's dismissal of this cause. Those proceedings culminated in a trial notice being issued scheduling trial for January 9, 1984.

On January 6, by telephone, the District Court raised the question of the propriety of submitting this case for trial on

the following Monday, January 9, 1984. The Court's concern apparently turned on a question of state law still outstanding regarding the meaning of the Accident Fund's enabling act. This issue was not novel, however. Rather, the question of the meaning of the Accident Fund's enabling act had been extant throughout the District Court proceedings.

The earlier discussions of the state law question had culminated an the agreement of the parties to submit certified questions to the Michigan Supreme Court requesting that Court's assistance in resolving the state law questions. On February 8, 1983, the certified questions were forwarded to the Michigan Supreme Court by the District Court. Both the State Attorney General and Petitioners submitted briefs arguing their respective construction of the state law. Both urged the Michigan Supreme Court to decide the state law questions.

On March 23, 1983, however, the Michigan Supreme Court declined to respond to the questions. Thereafter, the matter was scheduled for trial.

As mentioned above, on January 6, the District Court suddenly raised the question of whether it should abstain based upon the allegedly unsettled state law questions. After the parties briefed this issue over the weekend of January 7 and 8, 1984, the Court heard argument on the day set for the start of trial, January 9, 1984. During this argument, counsel for both the Accident Fund and the State of Michigan agreed that the District Court should go forward with the case.

Notwithstanding the Michigan Attorney General's agreement that the case should be tried before the Federal District Court, the court determined on the day set for trial that it would abstain under the doctrines set forth by this Court in *Railroad Comm'n v. Pullman Co., supra,* and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

Petitioner filed a timely appeal of the District Court's decision with the Court of Appeals for the Sixth Circuit. After briefing and argument, the Court of Appeals affirmed the District Court's decision based solely on the doctrine set forth in *Railroad Comm'n v. Pullman Co., supra*. Upon finding that abstention was appropriate on this ground, the Court instructed the District Court to retain jurisdiction only over Petitioners' ERISA claims. It failed to direct the court to retain jurisdiction over any of Petitioners' other federal constitutional or statutory claims.

A timely motion for rehearing was denied by the Court of Appeals on July 17, 1985.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT COURT OF APPEALS HAS FAILED TO DIRECT THE DISTRICT COURT TO RETAIN JURISDICTION OF PETITIONERS' FEDERAL CONSTITUTIONAL AND STATUTORY CLAIMS IN VIOLATION OF THE PRINCIPLES ESTABLISHED BY THIS COURT IN *RAILROAD COMM'N v. PULLMAN CO.* AND ITS PROGENY.

In this case, the Court of Appeals for the Sixth Circuit has taken the unprecedented action of dismissing Petitioners' federal constitutional and statutory claims in a case involving abstention under the doctrine set forth in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). The Court's order only directed the District Court to retain jurisdiction of Petitioners' claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001. The Court expressly refused to direct the District Court to retain jurisdiction of Petitioners' federal constitutional and statutory claims when it denied Petitioners' motion for rehearing requesting such relief.[1] Since the District Court had dismissed all of Petitioners' claims upon finding abstention appropriate, the impact of the Court of Appeals' action is to deprive the Petitioners of their right to continuing federal court jurisdiction subsequent to the determination of the state law questions which formed the basis for abstention under the *Pullman* doctrine.

A. The Decision of the Court of Appeals Conflicts with Applicable Decisions of this Court.

In this Court's decision in *Railroad Comm'n v. Pullman Co.*, *supra*, the Court, after stating the absention doctrine

---

[1] The Petitioners' other Federal Claims include claims under 42 U.S.C. § 1983, Article I, Section 10 of the United States Constitution, the Due Process and Just Compensation Clauses of the Fifth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

relied upon by the Court of Appeals here, set forth the following relief:

> "We therefore remand the cause to the District Court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion." 312 U.S. at p. 501-502.

Since the time of that remand, this Court has consistently held that where abstention under the *Pullman* doctrine is appropriate, the district court should retain jurisdiction of the plaintiff's claims pending a resolution of the state law questions. At that time, the district court should then address what further relief, if any, is justified. *See Zwickler v. Koota*, 389 U.S. 241, 244 n. 4, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967); *Harris County Commissioners Court v. Moore*, 420 U.S. 77 n. 14, 95 S. Ct. 870, 43 L. Ed. 2d 32 (1975); *Carey v. Sugar*, 425 U.S. 73, 96 S. Ct. 1208, 47 L. Ed. 2d 587 (1976); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964).

As can be plainly seen from the Court of Appeals' decision and its refusal to grant Petitioners any relief on rehearing, the Court has refused to direct the District Court to retain jurisdiction of Petitioners' federal constitutional and statutory claims in addition to those claims set forth by Petitioners under ERISA. Since the District Court dismissed *all* of Petitioners' claims, the Court of Appeals' failure to remedy this defect deprives Petitioners of their right to obtain a federal court determination of their statutory and constitutional claims once the state court interprets the state law at issue. As this Court noted in *England*,

> ". . . we have on several occasions explicitly recognized that abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.' *Harrison v. NAACP*, 360 U.S. 167, 177, 3 L. Ed. 2d 1152, 1158, 79 S. Ct. 1025; *accord Louisiana P.*

& L. Co. v. Thibodaux, supra, 360 U.S. at 29, 3 L. Ed. 2d at 1062." 375 U.S. at 416 (footnote omitted).

B. The Decision of The Court of Appeals Conflicts With The Decisions of The Courts of Appeal for Other Circuits.

The Court of Appeals' failure to direct that the District Court retain jurisdiction of all of Petitioners' claims pending resolution of the state law questions is unprecedented. Every other court of appeals circuit considering the question has held that outright dismissal of a plaintiff's claims is inappropriate. Rather, the district court should retain jurisdiction of a plaintiff's claims pending resolution of any questions of state law.

In *Pietzsch v. Mattox,* 719 F.2d 129 (5th Cir. 1983) the Fifth Circuit held that were a district court abstains under the *Pullman* doctrine that abstention

> " 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of of its exercise. . . .' *Zeigler [v. Zeigler,* 632 F.2d 535, 538 (5th Cir. 1980)]; *Harrison v. N. ACP,* 360 U.S. 167, 177, 79 S. Ct. 1025, 1030, 3 L. Ed. 2d 1152, 1158 (1959)." 719 F.2d at p. 132.

Similarly, in *D'Iorio v. County of Delaware,* 592 F.2d 681 (3rd Cir. 1978) the Third Circuit held that where *Pullman* abstention was appropriate, the case would be remanded to the district court with directions "that the district court retain jurisdiction and stay further proceedings pending a determination of proceedings in the appropriate state courts." 592 F.2d at p. 692. For similar results in the First Circuit, *see Catrone v. Massachusetts State Racing Comm'n,* 525 F.2d 669 (1st Cir. 1976). Finally, the manner of disposition used in the Ninth Circuit is adequately illustrated by the Court's opinion in *Sederquist v. City of Tiburon,* 590 F.2d 278 (9th Cir. 1978).

C. The Decision of the Court of Appeals Here Conflicts With Other Decisions of The Same Court.

In addition to the conflict between the Court of Appeals's refusal to direct that jurisdiction be retained by the District Court in this cause, a refusal which conflicts with other decisions of this Court and the other federal courts of appeal, the Court of Appeals' decision also conflicts with other decisions issued by other panels of the Sixth Circuit. For example, in *Tyler v. Collins*, 709 F.2d 1106 (6th Cir. 1983) the Sixth Circuit noted:

> "In accordance with the procedures set forth *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964), the district court should not dismiss these cases, but should stay the federal proceedings and retain jurisdiction over them. The appellants are still entitled to a federal forum for the adjudication of their federal claims, should the resolution of the state constitutional issue not obviate the need for such adjudication. . . ." 709 F.2d at p. 1109.

Clearly, that panel's reliance on this Court's decisions was proper and resulted in the appropriate remedy where a court determines to abstain under the *Pullman* doctrine.

The Court of Appeals' decision here conflicts with the decisions of this Court, the decisions of the other circuit courts of appeal, and the decisions of other panels of the Sixth Circuit. While Petitioners are parties to a state court action to obtain a determination of the state law question,[2] their federal constitutional and statutory claims remain outstanding. They have been dismissed in their entirety by the District Court, however, and the Court of Appeals has affirmed the dismissal.

The Court of Appeals' decision, being clearly erroneous and in violation of existing precedent, warrants granting

---

[2] Based upon the existing state court trial docket, it will be at least one more year before this case is tried.

Petitioners' requested writ. In order to preserve this Court's valuable resources, however, we submit that it would be equally appropriate for this Court to enter its order vacating the Court of Appeals' Order in this case and thereafter directing that the District Court retain jurisdiction of all of Petitioners' federal constitutional and statutory claims pending a determination of the state law issues in state court.

II. ABSTENTION UNDER THE PULLMAN DOCTRINE IS INAPPROPRIATE WHERE THE STATE REQUESTS FEDERAL COURT INTERPRETATION OF STATE LAW QUESTIONS AND WHERE THE STATE SUPREME COURT REFUSES TO ADDRESS STATE LAW QUESTIONS CERTIFIED TO IT BY THE FEDERAL COURT UPON STIPULATION OF ALL PARTIES.

When it was determined that the federal court would have to intepret state law in deciding some of Petitioners' claims, the Respondent Commissioner of Insurance, along with the Petitioners requested that the state law questions be certified to the Michigan Supreme Court for resolution. The District Court granted that request and certified the questions. After all parties had submitted briefs, the Michigan Supreme Court refused to address the certified questions, thereby leaving the state law questions to the determination of the Federal District Court.

The doctrine of abstention which has descended from *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941) represents an exception to the rule that federal courts should fully adjudicate claims within their jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). The purpose of the doctrine is to prevent "needless friction with state policies", *Pullman*, 312 U.S. at 500, by insuring that federal courts will not "adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176, 79 S. Ct. 1025, 1029, 3 L. Ed. 2d. 1152 (1959).

In the present case, this policy was satisfied. The certification to the Michigan Supreme Court that was refused by that Court constitutes more than a "reasonable opportunity to pass upon" the state law issues. In addition, the issues of comity that Justice Frankfurter found so compell-

ing in the *Pullman* decision are far less compelling where the state official empowered with administering and enforcing a particular state law seeks its interpretation in the federal courts. Finally, other issues that are well recognized as affecting the decision whether to abstain mandate that the District Court should be directed to retain jurisdiction and decide this case.

Although the Court of Appeals was correct in its identification of two of the considerations inherent in the abstention doctrine under *Pullman*, its failure to address other considerations not only resulted in a misapplication of the abstention doctrine, but also produced a conflict between the Court of Appeals for the Sixth Circuit and the other circuits. In fact, the Court of Appeals' decision here even conflicts with the decision of another panel of the same Circuit.

Other issues which the Court of Appeals failed to address include the costs and burden of delay, *Belotti v. Baird*, 428 U.S. 132, 96 S. Ct. 2857, 49 L. Ed. 2d 844 (1976), and the fact that neither party to the case requested abstention. *Hostetter v. Idlewild Bon Voyage Liquor Corp*, 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 350 (1964).

As a matter of sound Federal policy, abstention is simply inappropriate where state law questions have been certified to the State Supreme Court and that Court has declined to answer them. As noted above, this Court has stated that State courts need only be afforded "a reasonable opportunity" to pass upon issues of state law. *Harrison v. NAACP*, 360 U.S. at 167. Certification to the Michigan Supreme Court was such a reasonable opportunity.

The District Court's and Court of Appeals' insistence upon abstaining after such a refusal is in conflict with the Seventh Circuit's view in *Lister v. Lucey*, 575 F.2d 1325 (7th Cir. 1978). In that case, the Wisconsin Supreme Court refused to rule substantively on issues of state law that were the basis of the District Court's abstention. 575 F.2d at 1329.

The District Court found this dispositive on the abstention issue and the Court of Appeals for the Seventh Circuit affirmed. The Court reasoned that the friction potentially caused by federal court determination of state law questions must be minimal where the State Supreme Court had an opportunity to rule on the issue and refused to do so with full knowledge that the federal court was awaiting construction of the state statute. The Court interpreted this as the state court's admission of the unimportance of the issue:

> "The State's Supreme Court had an opportunity to rule on the issues involved, but despite its awareness that the district judge was awaiting its construction of the statute, held that the case was not important enough for it to use its inherent authority to decide the issue in the absence of proper procedural prerequisites. This admitted unimportance of the issue to the state judiciary rebuts defendants' contention and the district court's conclusion that 'the force of the reasons for awaiting state judicial action *** is undiminished.' A. 40. Cf. *Hull v. Petrillo*, 439 F.2d 1184, 1188 (2d Cir., 1971). In fact, even if the state court had not admitted that it viewed the issue as unimportant, its deliberate avoidance of the issue due to jurisprudential concerns could be sufficient to overcome any comity considerations and justify the reassertion of federal jurisdiction. *414 Theater Corp. v. Murphy*, 499 F.2d 1155, (2d Cir., 1974)." 575 F2d at 1332.

In addition, the jurisprudential concern of imposing a three year delay on the plaintiff's plea for relief was held to be "sufficient to overcome any comity considerations and justify the reassertion of federal jurisdiction." 575 F.2d at 1332. This concern is consistent, of course, with this Court's recognition that undue delay is a valid concern in determining whether to abstain.[3] *Belotti v. Baird*, 428 U.S. 132, 150,

---

[3] Here, the case was over two and one-half years old and literally on the eve of trial when dismissed. The ensuing state court proceedings are now over one and one-half years old and are at least another year or two from trial.

96 S. Ct. 2857, 49 L. Ed 2d 844, 857 (1976), citing *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 and *England v. Medical Examiners, supra*.

The Seventh Circuit's decision is indistinguishable from the Sixth Circuit's own decision in *WXYZ, Inc. v. Hand*, 658 F.2d 420 (6th Cir. 1981). In *WXYZ*, a question as to the meaning of a state statute was at issue. The District Court certified the question to the Michigan Supreme Court. As here, the Michigan Supreme Court refused to address the state law question. In response to a request for abstention, a different panel of the Sixth Circuit stated that once the state court had declined the opportunity to interpret the state law, the district court properly decided the merits of those questions. 658 F.2d at 425.

Another recent decision of the Sixth Circuit rejecting the *Pullman* doctrine under circumstances similar to the case at bar is *Traughber v. Beauchane*, 760 F.2d 673 (6th Cir. 1985), wherein the state court's refusal to entertain argument on and decide the issue of the viability of a state statute required the federal court to determine the issue. In *Traughber*, the Sixth Circuit stated that where a state court has refused to decide an issue that forms the basis for abstention in the federal court, further abstention by the federal court would turn judicial comity into "judicial comedy at the expense of the [plaintiffs]." 760 F.2d at 682.

Also in accord with the view of the Seventh and Sixth Circuit is the Fifth Circuit, whose opinion in *United Service Life Insurance v. Delaney*, 358 F.2d 714 (5th Cir., 1966) was cited favorably in the *WXYZ* case.[4]

A second reason why abstention was improper here is found in the Respondent's desire to have the state court issue decided by the federal court. Not only did the Respondent, who is the state official charged with the duty of

[4] It is important to note that in the opinion of the Court of Appeals in this case, the *WXYZ* case was neither cited, distinguished, nor overturned.

enforcing and administering the state law in question, initially stipulate to the certification of the state law questions to the Michigan Supreme Court, but she did not support federal court abstention when that issue was raised by the District Court on the eve of the trial. Such actions indicate that possible friction between the state and the federal systems in either the judicial or executive branches is merely an illusion here. When faced with similar circumstances, the Court of Appeals for the Third Circuit held:

> "[O]ne of the principal rationales for *Pullman* abstention is not applicable in this case. The defending party is an arm of the state and, by its motion to restore this case to the active calendar, sought to have the matter adjudicated in federal court. Therefore, there is little reason to believe that abstention would advance federal-state comity. Instead, the contrary is the case. . . ." *Professional Plan Examiners of New Jersey, Inc. v. LeFante*, 750 F.2d 282, 290-291 (3rd Cir. 1984).

In *LeFante*, the Court also noted this Court's holding that "abstention was unwarranted . . . where neither party requested it and where the litigation had already been long delayed. . . ." Ibid.

In the present case, abstention was raised by the District Court *sua sponte* on the eve of trial. At the time, there was no state court action pending. The substantial delay caused by the District Court's abstention here is more than obvious. As in *Hostetter*, abstention is unwarranted since neither party requested it and the litigation has been delayed over five years. Such is the unwarranted abdication of federal jurisdiction of which the *LeFante* case warns.

For the foregoing reasons, Petitioners respectfully submit that it was clearly erroneous for the Court of Appeals and the Federal District Court to apply the *Pullman* doctrine of abstention in this case. The Court of Appeals decision conflicts with the applicable decisions of this Court and the other Courts of Appeal having reached the issue. It con-

stitutes federal abdication, not abstention, and it should be reviewed and then reversed by this Court. It is time to clearly establish that abstention is still the exception, not the rule. Where the state courts are uninterested and where the state itself requests federal court intervention, there can be no sound reason for abstention.

RELIEF REQUESTED

Petitioners request that their Petition be granted. Should the Court believe that abstention in this case was proper, however, we request that in lieu of granting the Petition, this Court vacate the order of the Court of Appeals for the Sixth Circuit insofar as it fails to direct the District Court to retain jurisdiction of all of Petitioners' federal claims. We ask that this cause then be remanded to the District Court where that Court shall retain jurisdiction of Petitioners' claims pending the resolution in the state courts of any questions as to the meaning of applicable state laws.

Respectfully submitted,

By: Theodore W. Swift (P 21213)
David VanderHaagen (P 23169)
James D. Adkins (P 27746)
313 South Washington Square
Lansing, MI 48933
Telephone: (517) 372-8050

MICHIGAN STATE ACCIDENT FUND

By: Frank J. Nerat, Jr. (P 29140)
Assistant Manager and General Counsel

232 South Capitol Avenue
Lansing, MI 48933
Telephone: (517) 485-7193

Dated: October 11, 1985

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

ACCIDENT FUND, a Legal Entity
Authorized by the Michigan Legislature
Pursuant to 1912 PA 10 (First Extra Session)
Part V, §1, 1915 CL 5477, *et al.*,
Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance
of the State of Michigan, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Petitioners
By: Theodore W. Swift (P 21213)
David VanderHaagen (P 23169)
James D. Adkins (P 27746)
313 South Washington Square
Lansing, MI 48933
Telephone: (517) 372-8050

MICHIGAN STATE ACCIDENT FUND
By: Frank J. Nerat, Jr. (P 29140)
Assistant Manager and General Counsel
232 South Capitol Avenue
Lansing, MI 48933
Telephone: (517) 485-7193

Dated:
Oct. 11, 1985

TABLE OF CONTENTS

	Page
Court of Appeals Order, July 17, 1985	1a
Court of Appeals Opinion, June 26, 1985	2a
District Court Transcript of Ruling, February 2, 1984	8a
District Court Docket Sheet	58a

Court of Appeals Order

No. 84-1130
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ACCIDENT FUND, ET AL.,
Plaintiffs-Appellants

vs.

NANCY A. BAERWALDT, ET AL.,
Defendants-Appellees

ORDER

BEFORE: KEITH and KRUPANSKY, *Circuit Judges;* and PHILLIPS, *Senior Circuit Judge*

This matter is before the Court on consideration of the appellant's petition for rehearing of this Court's order of June 26, 1985, affirming the opinion of the District Court.

After carefully examining the record, this Court finds that it misapprehended no questions of law or fact in its order of June 26, 1985.

It is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, *Clerk*

COUKT OF APPEALS OPINION

NOT FOR PUBLICATION

84-1130

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA10 (First Extra Session) Part V, Sec. 1; 1915 CL 5477, WARD ELLISON and MAX GROST, individually, ELSTON-RICHARDS STORAGE COMPANY and RUSSELL JAMESON, individually,
Plaintiffs-Appellants,

On Appeal From The United States District Court for the Western District of Michigan.

v.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan; SILVERIA O. KANOYTON, Personnel Director of the State of Michigan; JOHN HEUENI, Director of the Department of Licensing and Regulation of the State of Michigan; LOREN MONROE, Treasurer of the State of Michigan; GERALD MILLER, Director of Management and Budget of the State of Michigan; and MICHIGAN CIVIL SERVICE COMMISSION,
Defendants-Appellees.

Decided and Filed:

BEFORE: KEITH and KRUPANSKY, *Circuit Judges*, and PHILLIPS, *Senior Circuit Judge*.

PER CURIAM: The plaintiffs in this case are the Accident Fund (the Fund), a state-created insurer of workmen's

compensation plans; and two long-term employees of the Fund who hold pension policies governed by the Employees' Pension Trust and Plan, a benefits plan maintained by the Fund for its employees.[1] The defendants, all officers of the State of Michigan, include the Commissioner of Insurance, the Personnel Director of the Civil Service Commission, and the Director of the Department of Licensing and Regulation.

The plaintiffs appeal from an order entered by the United States District Court for the Western District of Michigan dismissing the case on February 2, 1984. The dismissal was based on the district court decision not to exercise federal jurisdiction pursuant to the doctrines of abstention espoused in *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) and *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941). For the reasons stated below, the district court judgment is affirmed.

The facts of this case arise from a dispute over whether the Accident Fund is a state agency or an autonomous insurer of workmen's disability compensation. In 1912, the Michigan Legislature created the Fund in conjunction with one of four methods authorized under the first Michigan Workers' Compensation Act for employer payment of workers' compensation claims. 1912 Public Act 10 (First Extra Session) Part V §1; *See* 1969 P.A. 313 as amended (MCLA 418.101; MSA 17.237 (101)). Under the fourth method of compensation payment provided in the Act, five or more employers may request the Commissioner of Insurance to collect compensation premiums from them and administer the monies through the Fund. *Id.*

---

[1] The claims of plaintiffs Elston-Richards Storage Company and Russell Jameson, employers who have memberships on the Advisory Board to the Fund and workmen's compensation policies insured by the Fund, were resolved by stipulation and a consent judgment entered by the district court on January 9, 1984. Thus, Elston-Richards Storage Company and Russell Jameson are not parties to this appeal.

In the provisions of the Act governing administration of the Fund, the Legislature accorded the Commissioner broad authority over the Fund's operation, including the discretionary power to dissolve it. However, the plaintiffs allege that since the Fund's inception, Michigan Commissioners of Insurance have not exercised this plenary authority but have instead allowed the Fund's Advisory Board to direct its operations. Thus, the plaintiffs assert that until December 1976, the Board conducted Accident Fund activities fiscally and administratively independent of the State, including maintenance of the Fund employees' pension plan under the Employee Retirement Income Security Act of 1974 (ERISA).[2]

On December 7, 1976, Attorney General Frank Kelly issued an opinion which precluded the Fund's operation as an independent entity; the opinion formally classified the Fund as a state agency and assigned its employees to the State Civil Service. O.A.G. 1975-1976 No. 5147, p.695, 698 (December 7, 1976). Pursuant to the Attorney General's opinion, state agencies proceeded with measures to transfer fund employees to the State Civil Service system. The plaintiffs first challenged this reassessment of the Fund's status by requesting a hearing before the Commissioner of Insurance and by persuading the Michigan Senate to initiate legislation establishing the Fund as an autonomous entity controlled by the Advisory Board. Both of these efforts, however, failed. On May 1, 1981, the plaintiffs filed a complaint for injunctive and declaratory relief in the district court.

The plaintiffs alleged *inter alia* that the Fund had operated as an independent legal entity since its inception; that the pension plan provided for Fund employees wass subject to ERISA; and that the defendants' effort to convert the Fund into a state agency violated several provisions of

[2] 29 U.S.C. §1001.

ERISA, as well as the plaintiffs' rights under the fifth and fourteenth amendments of the Constitution to just compensation for deprivation of property by the state, due process of law and equal protection of the laws. The plaintiffs also alleged that the defendants' actions impaired the plaintiffs' contracts in violation of Article 1, Section 10 of the Constitution, and generally deprived them of the rights, privileges and immunities accorded by the Constitution in violation of 42 U.S.C. §1983. The defendants denied that the Fund is an independent entity and all other material assertions made by the plaintiffs.

On August 9, 1982, the district court initially granted partial summary judgment to the defendants. The court ruled that the Fund was a state agency. Upon reconsideration, the district court reversed its ruling on November 16, 1982, and subsequently certified several questions about the Fund's status to the Michigan Supreme Court. The Michigan Supreme Court declined to review the certified questions. The defendants filed a second motion for summary judgment and a motion to dismiss which the court denied on November 15, 1983. Trial was set for January 9, 1984. On that date, however, the court entered a consent judgment on the policy holders' claims and issued from the bench an oral judgment not to exercise federal jurisdiction. In support of its decision, the district court cited the *Burford* and *Pullman* doctrines of abstention. The court entered its order dismissing the case on February 2, 1984. This appeal followed.

DISCUSSION

On appeal, the plaintiffs contend that the district court decision to abstain under *Railroad Commission v. Pullman*, 312 U.S. 496 (1941), constitutes reversible error because the Michigan Supreme Court refused to consider the certified questions of state law submitted by the district court and because the plaintiffs' ERISA claim involved no issues of state law. We do not agree.

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Supreme Court held that federal court abstention from exercising jurisdiction is appropriate where state court adjudication of an issue under state law would be determinative of related federal claims. *Id.* at 501. As stated in *Colorado River Water Conversation District v. United States*, 424 U.S. 800 (1976), "abstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.' " *Id.* at 814 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). In *Tyler v. Collins*, 709 F.2d 1106, (6th Cir. 1983), this Court established two requirements for *Pullman* abstention: an unclear state law and the likelihood that a clarification of the state law would obviate the necessity of deciding the federal claim question. *Id. at 1108.*

We agree with the district court that both requirements for *Pullman* abstention are present in this case. It is clear from the record that the threshold question underlying all of the plaintiffs' claims, (whether the Fund is a state agency), is an unsettled question of Michigan law. The most likely resolution of this issue is that the Fund is a state agency,[3] a decision which obviates any need to address the plaintiffs' ERISA claim since that statute does not govern government pension plans. *See* 29 U.S.C. 1002(32); 1003(b)(1).

Accordingly, we find no merit in the plaintiffs' contention that the district court was required to entertain the ERISA claims as they involved no issues of state law. This argument is unsound. Preliminary consideration of the plaintiffs' ERISA claims requires resolution of the same underlying threshold issue of state law: is the Fund a state agency?

[3] We base this observation on the unrepealed legislation according on the Commissioner of Insurance plenary power over the Fund, and direct liability for the receipt and disbursement of Fund monies. We also note the latest pronouncement by the Michigan Attorney General classifying the Fund as a state agency.

As noted above, if Michigan courts answer yes to this query, then the ERISA claims do not arise.

We also find no merit in the plaintiffs' contention that the Michigan Supreme Court failure to resolve the certified questions required the district court to exercise jurisdiction. The Michigan Supreme Court's refusal to consider the questions submitted by the district court is not determinative of the decision to abstain in this case. At the time of certification, several unresolved factual disputes over how the Fund operated, precluded issuance of a cogent ruling on the Fund's status. As those disputes are currently under consideration in the Ingham County Circuit Court, on appeal the Michigan Supreme Court will have the benefit of a clear factual record with which to resolve the dispute over the Fund's status. Since the two requirements for *Pullman* abstention are present in this case, the district court judgment to abstain is affirmed with instructions for the district court to retain jurisdiction over the plaintiffs' ERISA claims.

District Court Transcript of Ruling

(1)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature pursuant to 1912 PA10 (First Extra Session), Part V, Sec.1; 1915 CL 5477, WARD ELLISON and MAX GROST, individually, ELSTON-RICHARDS STORAGE COMPANY and RUSSELL JAMESON, individually,
Plaintiffs,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of State of Michigan, et al,
Defendants.

No. 81-224

January 9, 1984
Approx. 12:15 p.m.

Kalamazoo, Michigan

TRANSCRIPT
OF
RULING OF THE COURT

BEFORE: THE HONORABLE RICHARD A. ENSLEN, DISTRICT JUDGE.

TRANSCRIPT ORDERED BY:

PRESENT:

For the Plaintiff: Foster, Swift, Collins & Coey
By: THEODORE W. SWIFT, ESQ.
FRANK J. NERAT, JR., ESQ.
313 S. Washington Square
Lansing, MI 48933

For the Defendant: Attorney General, State of Michigan
By: HARRY G. IWASKO, JR., ESQ.
Assistant Attorney General
704 Law Building
Lansing, MI 48913

Court Reporter: JARRATT W. MARTIN, RPR-CM
U. S. District Court Reporter
Federal Building
Kalamazoo, MI 49005

(2)

JANUARY 9th, 1984 KALAMAZOO, MICHIGAN
Approximately 12:15 p.m.

THE COURT: To start with two or three non sequiturs — one, perhaps, is not a non sequitur. The Court believes that the consent judgment presented to the Court prepared evidently by the plaintiffs ought to be signed, and I have signed it with the amendments suggested by counsel, which amendments include an amendment on page three of the proposed consent judgment after the word "Fund," and before the word "are," paranthesis, "which the defendants claim are public funds and plaintiffs claim are private funds," end parenthesis. The rest of paragraph two reads as it did.

I have also struck out the extra "B" in the fifth line from the bottom of paragraph three which was simply a typographical error. Then I have inserted by means of a caret in paragraph five the word "or" in the fifth line from the bottom between the words "ripe" and "to."

I have not altered the first paragraph, jurisdictional paragraph, because I believe it accurately sets forth the controversy in this court, and I also believe that that is part of the pretrial order entered by the Court quite a long time ago. I have only a Xerox copy of the stipulation, but I do have a copy of the order that I now hand to my clerk for later distribution. That is not a non sequitur. That has some relevance to the lawsuit. The (3) relevance is that a perceived

issue, whether it was or not, was whether or not the Fund at dispute in this case was possessed by the state of Michigan or some other agency and whether or not a "raid" was about to be made. That sort of thing is simply set aside as of no consequence because the plaintiffs and the defendants have stipulated as to it.

I might say that I thought such a stipulation while reluctantly from the defendants' mouths had been there months and months ago, and as recently as the most recent meeting that I can recall between counsel I thought it not to be a dispute in the slightest. I don't think it is.

Therefore, the employers insureds' problems with regard to the nature of the Fund is resolved by consent and consent judgment. I note that the consent judgment was also stipulated to in the stipulation by the parties.

Now, the non sequiturs. Mr. Iwasko this morning wondered aloud whether or not in Ada-Cascade the abstention issue was sua sponte, and I responded by telling him it was sua sponte. In Ada-Cascade, no one called my attention to a potential abstention problem. If they had, it is my belief and hindsight that I would have found the second prong of Burford, or the third prong of Burford, depending upon whom you listen to, to be inapplicable because of the alternative nature of the statutory language on water (4) resources, that Ingham County was but one of more than one county which could resolve a dispute involving hazardous wastes and water resources, which is the same language that I find in the statutory authority regarding the scheme of insurance coverage by the state of Michigan.

That is hindsight and has little merit to what I am about to say. That is simply my guess as to what I would have done had it been called to my attention. Secondly, by way of non sequitur and pure dicta, I would not have looked at Pullman had I not had my attention called to Ada-Cascade on Friday morning at about eight o'clock, and that is, of course, a decision of the Court of Appeals in November, barely two months old, and not as yet published, and not called to my attention until Friday.

There are no other no sequiturs that I wish to discuss at this time.

This action, interesting and complicated, involves a construction problem in a 1912 legislative act which has avoided judicial review or scrutiny for 70 years, and for reasons unknown to me. It is my belief that until 1976 the issue was not particularly pertinent to those involved in the insurance industry and to the State Accident Fund in particular.

In 1976, the Attorney General of the State of Michigan opined that the State Accident Fund was a state (5) agency, or a state arm, and that caused the then Commissioner, a male, to issue a directive to the State Accident Fund with regard to classification of employees, and with regard to pension funds and other things that would be inherent in state authoritarian bureaucracy. That was objected to by the Accident Fund in a letter or communication to the insurance commissioner who denied the Accident Fund a hearing. This suit followed.

As the record is clear, this Court attempted with the able assistance of counsel to certify the underlying issue of the nature of the Accident Fund to the Michigan Supreme Court without avail. In a spirit of, I might say, comity and federalism, that request was made by me in this very room with these very lawyers present. The action that was filed by the plaintiffs — and what an anomalous situation. I continue to talk about some anomalies that concern this Court. What a series of anomalous things occurred thereafter.

One of the anomalies that occurred: Who represents the Accident Fund? The plaintiffs had filed a lawsuit. The plaintiffs had apparently counsel from a Lansing law firm for many years. At a point in the lawsuit, the question was raised that maybe the Attorney General represented both sides inasmuch as the Attorney General took the position that this was a state agency. The Court dealt with that as best it could at the time. The issue is (6) unresolved today and is unresolved today because at least on the question of funding additional issues that had similar consequence arose.

Could the Foster law firm enter the state Accident Fund premises? Could the Foster-Collins-Swift law firm talk to its current or former clients? Could the law firm have access to written materials that were necessary to answer interrogatories? A whole series of nonsensical absurdities occurred it seemed seriatim and in my judgment will continue to occur. But so be it. Sigh, and move on.

This action involves a complaint by plaintiffs for injunctive declaratory relief against the alleged deprivation under color of law, that is to say, under color of state law, that defendants have deprived plaintiffs of their rights, privileges and immunities under the United States Constitution and under one federal statute and certain other jurisdictional federal statutes.

Specifically, and even after the resolution that I make of the proposed consent judgment, the plaintiffs allege that they have had an impairment of contract action, Impairment of Contracts Clause of Article 1, Section 10, of the United States Constitution, and, furthermore, that their due process rights and just compensation rights in the sense of property rights to their employment and to their pensions, and all other incident to employment, were deprived by the (7) state in violation of the Fifth Amendment of the United States Constitution, of the Due Process and the Equal Protection clauses of the Fourteenth Amendment; and, specifically, statutorily that there was a violation with regard to the federal legislation known as ERISA, but more accurately known as 29 USC 1001 et seq..

Pivotal to the resolution of all of those issues is the issue of whether the Accident Fund is an agency or instrumentality of the state of Michigan or whether it is some kind of private or quasi-public, private agency, and which can only be determined by reference to Michigan statutory law, legislative history, Attorey'Generals' opinions, and, if in fact any exists, common or case law.

With that background, the Court on Friday began to worry about and to think about, and read about, and ana-

lyze, and to a degree agonize over abstention. With in the first hour of that "agony," I contacted the lawyers.

My purpose was more selfish than not, I think, and that was to obtain what assistance I could from them with regard to what appeared to me to be relatively clear-cut doctrinal statements from various federal courts, but most particularly statements from the United States Supreme Court.

As a starting place, the Court takes a relatively recent case to establish the watershed of this view of abstention.

(8)

I am quoting:

> "Abstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.' "

That is a quote from Colorado River, so-called for brevity, a 1975 Supreme Court case which contains within it a large portion of a quote from Allegheny vs. Mashuda, a 1959 United States Supreme Court opinion.

There are three general categories of circumstances appropriate for the exercise of the doctrine of abstention, with the Supreme Court recognizing with apparent approval a fourth not addressed by the lawyers in their briefs nor in their arguments. Two of these categories are clearly inapplicable in this case.

The first of these is the so-called "Younger" doctrine, about which all law students know, wherein abstention (9) is deemed appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been

invoked for the purpose of restraining state criminal proceedings. That is the Younger doctrine. This category in Younger, however, has also been extended to cases involving state nuisance proceedings antecedent to a criminal prosecution, and also state proceedings involving the collection of state taxes. The Colorado River case mentions that directly.

This category does not include the case at hand. We deal here neither with a state criminal proceeding, nor a nuisance proceeding, nor a tax collection. Likewise, this Court has not been asked to restrain or make a declaratory ruling regarding any pending state court action. The fourth form of abstention — I call it the fourth form of abstention — is one recognized only informally by the Supreme Court, but nonetheless recognized. This category involves cases where there is a similar action pending in state court. In such a case, abstention is thought to be justified on the basis of convenience for the federal court in avoiding duplicative litigation. Although not referred to as abstention always, this action is discussed with approval, once again, in Colorado River, and specifically at pages 817 and 818. There is no similar action pending in state court insofar as I know, or insofar as my attention has been directed, and that particular doctrine of abstention, if that is what it is, (10) is inappropriate in this case.

Of considerable more interest, however, as the lawyers argued this morning, is the so-called Pullman and Burford doctrines of abstention. I turn to them in that order, for Pullman is the oldest in the order of abstention cases known to this country. It was decided by the Supreme Court in 1941 at the outset or prior to the outset of World War II, and as specifically labeled, Railroad Commission vs. Pullman Company, is found at 312 US 496.

In Pullman the Court held that abstention may be appropriate where a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent and ambiguous state law. That case

involved an order issued by the Texas Railroad Commission regarding the requirement of a Pullman conductor to operate sleeping cars on railroad lines within the state of Texas.

The order was challenged on grounds that it was unauthorized by Texas law as well as violative of the Equal Protection, Due Process, and Commerce clauses of the United States Constitution and its amendments. Intervening complainants alleged that the order was also discriminatory against black citizens in violation of the Fourteenth Amendment, generally.

Recognizing that a determination that there was no authority in state law for the Commission's order would end (11) the litigation without the constitutional issue having arisen, the Court remanded the cause to the district court with directions to retain the case pending a determination of the state law questions. In reaching this decision, the Pullman court relied upon ancient notions of comity, stating in part:

> "The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies."

I omit a number of cites. Continuing the quote:

> "These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

That quote is taken from pages 499 and 501 of the official U. S. Report.

The Sixth Circuit has discussed the Pullman (12) doctrine in many instances, and recently in a case involving a

Tennessee law issue on real property cited by the Sixth Circuit in 1983, as United States vs. Anderson County. This was an action involving an allegation that a real property tax assessed by a county against the operator of a plant owned by the United States was in violation of Tennessee law and was unconstitutional and void as constituting a discriminatory tax upon the United States. The Sixth Circuit held that because the threshold issue of contractual interpretation was federal, as were the ultimate constitutional challenges to the state taxation, and because the underlying state taxation statutes were non-ambiguous, Pullman abstention was inappropriate.

A notion which I might note in passing, and I have seen over and over again in these last three days not only in this circuit but in other circuits, in the case at hand it is my opinion from listening to — well, why say it that way? The plaintiffs did not address the Pullman doctrine question in their brief for reasons stated by Mr. Nerat succiently on the record this morning — because he did not understand the Court was concerned with Pullman doctrine. The defendants did address it although only briefly, and this morning in argument it seemed to the Court that a fair reading of the arguments made by Mr. Nerat and Mr. Iwasko was that, of course, the Pullman doctrine does apply. As much as they don't want it to apply, it is their opinion as well as mine (13) that it does apply. And, as I indicated, I may not have looked at that had I not been called to look at the Burford doctrine first.

I think this is almost a classic Pullman doctrine situation. The Accident Fund in this case phrased its cause of action solely in federal constitutional grounds and the ERISA statute basis. All parties admit that the threshold question is whether the Accident Fund is a state agency or instrumentality which is a question of state statutory interpretation.

If the Fund is a state agency, the Insurance Commissioner was arguably within his authority to issue the orders which led to the initiation of this lawsuit.

If the Fund is not a state agency, the Commissioner was arguably without authority to issue those orders.

I have previously stated my belief, which I still hold, that Michigan statutory law governing the Accident Fund is ambiguous as to the question of the status of the Fund as a state agency. This state law would seem to fall squarely within the category of questions to which Pullman was addressed.

Furthermore, inasmuch as the constitutional claims of plaintiffs depend to a large extent upon whether or not the Fund is a state agency, and thus, whether or not (14) the Insurance Commissioner's orders were valid, the Pullman prerequisite of the federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law is certainly satisfied. Being mindful of the principles of comity expressed by the Court in Pullman, I believe that abstention as to the constitutional claims of plaintiffs on the basis of the Pullman doctrine is not only proper but necessary, and I exercise my discretion to abstain on Pullman grounds, but do not rely solely upon the Pullman issue.

As I mused on Pullman over the weekend, it was very difficult for me to see how a state interpretation of the status of the Accident Fund would not entirely moot the litigation. I finally, however, found within my mind a possibility that it would not moot a certain ruling that I might make, but it would essentially and to a large extent alter the posture of the decision because of the resolution of state law.

It must be obvious to the listener of this opinion, to the reader, why that is so clearly true, and it must be remembered that there is a constitutional issue as is required by Pullman, stated in three different aspects, Article One, Amendment Five, and Amendment Fourteen, staring the Court in the face, demanding that the Court resolve a state issue of considerable concern and ambiguity in this (15) Court's mind. I abstain for Pullman reasons.

The final category of abstention recognized by the Supreme Court is what has been argued at greatest length

today, that is in dispute, and that is the Burford, so-called Burford doctrine established by the Court in the case of Burford vs. Sun Oil Company, 319 United States 315, 1943, a mere two years after the Pullman doctrine. It is this doctrine to which the attention of the parties was drawn last Friday. I had at that time read for the first time a case which I will refer to as Ada-Cascade Watch Company, et al, vs. Cascade Resource Recovery, Inc., being a November 3rd, 1983 decision, two to one, involving a majority of the judges, Judge Keith, visiting Judge Timbers, and a dissent, Judge Merritt. Of course, the parties know even more than that, that that case grew not only out of the Sixth Circuit someplace, not only out of the Western District of Michigan someplace, but out of this very court.

The Ada-Cascade case said that I should have abstained on the basis of the Burford doctrine, and mandated that abstention, which, of course, I have followed. Consideration of Burford and its progeny as well as the arguments made by plaintiffs and the defendants in opposition to abstention submitted to the Court in memorandum on Saturday and on Monday, and in oral argument, has not alleviated my deep concern. Like Pullman, abstention under (16) the Burford rationale involves principles of comity. You start from the same place. Allegheny County vs. Mashuda, to which I previously referred, made the same observation. But abstention is deemed appropriate in cases involving "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case." It is considered sufficient that the exercise of federal review of a state law question in a particular case and in similar cases would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," a near verbatim quote from Colorado River at page 814 of Colorado River.

As the Sixth Circuit explained in the Ada-Cascade case, quote:

"The Burford abstention, however, is not appropriate 'merely because resolution of a federal question may

result in the overturning of a state policy.' . . . The state must exhibit an overriding interest in the subject matter . . . Additionally, the state must centralize review in a forum with special competence . . . The key question is whether an erroneous federal court decision could impair the state's effort to implement its policy."

That is from the slip opinion of Ada-Cascade at pages 12 and 13. Specifically at page 13, the majority in (17) Ada-Cascade said there are two factors that justify an abstention under a Burford philosophy, first the presence of a complex state regulatory scheme which would be disrupted by federal review, and, secondly, the existence of a state created forum with specialized competence in a particular area.

Burford involved an attack upon the validity of an order of the Texas Railroad Commission granting petitioner Burford a permit to drill several oil wells. Jurisdiction was invoked on diversity and federal question grounds, the federal question being a constitutional due process challenge to the order. The court, after recognizing that abstention may be appropriate both in cases of diversity jurisdiction and in cases invoking federal question jurisdiction, held that the federal court should have abstained from the case on the ground that the issues involved a specialized aspect of a complicated regulatory system of local law which should have been left to the local administrative bodies and courts. And all cases, by the way, since that time have indicated that Burford does not require a federal question, does not require a constitutional issue, and may only be a pure diversity case invoking federal jurisdiction, or may on the other hand have constitutional issues and federal questions raised.

Unlike the Pullman doctrine, therefore, where (18) the court merely stays the proceeding pending a state determination, abstention under Burford results in dismissal of the action. See, for example, Nasser vs. City of Homewood, from the Eleventh Circuit in 1982, located at 671 F.2nd 432. Where abstention is justified on both Pullman and Burford type grounds, the action should be dismissed with prejudice. See Wright and Miller, Volume 17, Section 4245.

In Ada-Cascade, the Sixth Circuit was asked to review a summary judgment decision of this Court in an action involving a dispute over the construction of a facility for disposal of hazardous waste products. It was asserted that the construction of the facility violated the federal Resource Conservation and Recovery Act, RCRA, 42 USC 6901, et seq, because the facility allegedly failed to obtain all the necessary state environmental permits as required by the Act.

A decision as to compliance with the state environmental permit requirements was dispositive of the federal statutory issue. Having determined that the toxic waste facility had obtained all the necessary state permits, and thus was not in violation of RCRA, I granted summary judgment in favor of the defendants. The Sixth Circuit abstained from deciding the issues presented on appeal, and remanded to this Court with instructions to dismiss on the grounds of abstention.

The Sixth Circuit noted that appellants' (19) contentions required, first, a determination as to whether there exists an inconsistency between an administrative rule adopted by the state Department of Natural Resources and a Michigan statute, and, secondly, the Court to disagree with the DNR's conclusions as to what permits are necessary under state law in order to begin construction of a hazardous waste facility. Based upon the Burford doctrine, the Court refused to make those determinations.

The Court recognized that the Supreme Court in Burford enunciated two factors which justify abstention. I have already referred to those as appearing at page 13 of the slip opinion, and I will not repeat them here.

As to the first factor, however, the Court at page 14 of Ada-Cascade in the slip opinion said, quote:

> "The State of Michigan has an overriding interest in the protection of its environment from the effects of unregulated hazardous wastes. This overriding interest is manifested in the state's implementation of a vigorous and complex administrative procedure for the approval of

construction of hazardous waste facilities. In 1973 the state created the Department of Natural Resources" . . . as "the 'state entity responsible for the development and coordination of all environmental functions and programs of Michigan.' "

(20)

The Court then briefly reviewed the permit approval process involved in the construction of hazardous waste facilities, concluding at page 17, as follows:

"The state has developed a complex and systematic process to evaluate facilities which will have an impact on the environment. This permit process enables the state to implement a consistent and coherent state policy toward hazardous waste facilities in the state."

As an initial matter, now discussing how Burford relates to the case at hand, I invite the reader or listener to a quote found within a case cited by Mr. Nerat that I had not read before today and that I will call Construction vs. Rivera. It is a Second Circuit case. The record shows why Mr. Nerat argued that it was important. There is a quote early in the case that talks about the philosophy of an equity court, and federal court as myself, with regard to the issue of comity and federalism, and predating the abstention doctrine of Pullman by eight years, and written by Benjamin Cardozo, for whom all lawyers in this room maintain considerable respect. Justice Cardozo said, as follows:

"Caution and reluctance there must be in any case where there is the threat of opposition in respect of local controversies between state and federal courts. Caution and reluctance there must be in (21) special measure where relief if granted is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. Reluctance there must be to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. There must be reluctance even greater when the rights are

strictly local, jurisdiction having no other basis than the accidents of residence. The need is clamant in such circumstances for cautious hesitation."

That is an interesting forerunner and predecessor of the Supreme Court's enunciation in both Pullman and Burford, and directly speaks about, in the instant case, the actions of the state Attorney General and the state Insurance Commissioner in the sense that Cardozo cautions that there ought to be reluctance in special measure where relief if granted would be an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties, which of course runs almost head on with what the state was doing in 1976 and 1977. It, the state, was at a minimum trying to invoke a regulatory system long in existence with a question as to what entity was the State Accident Fund.

(22)

Also quoting from the Construction case which has greater interest to me later is the quote within a quote as to Burford — in fact, it is a Burford quote. So I will give it its Burford genesis.

"Although a federal equity court does have jurisdiction of a particular proceeding, it may in sound discretion, whether its jurisdiction is invoked on the ground of diversity or otherwise, refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest, for it is in public interest that federal courts of equity should exercise their discretionary power with proper regard to the rightful independence of state governments in carrying out domestic policy."

In the instant case, in addition to what I have already said, I believe there is an equally complex state regulatory scheme which would be disrupted if federal court review were permitted. The state of Michigan has promulgated a massive amount of legislation regarding the conduct of the insurance industry in this state in general.

In fact, the Insurance Code of 1956 contains an entire volume, or takes up an entire volume, of the Michigan statutes. Interestingly enough, the purpose of the Insurance Code as stated in its prefatory legislative language says:

(23)

"An act to revise, consolidate and classify the laws relating to the insurance and surety business; to regulate the incorporation of formation of domestic insurance and surety companies and associations and the admission of foreign and alien companies and associations; to provide their rights, powers, and immunities and to prescribe the conditions on which companies and associations organized, existing, or authorized under this act may exercise their powers; to provide the rights, powers, and immunities and to prescribe the conditions on which other persons, firms, corporations, and associations engaged in an insurance or surety business may exercise their powers; to provide for the imposition of a privilege fee on domestic insurance companies and associations and the state accident fund," semicolon, and so forth, all drawn from MSA 24.1100 et seq.

It is interesting to note that in its very introductory language the State Accident Fund is mentioned in the Insurance Code of 1956. But in addition, Michigan has promulgated an extensive Worker's Disability Compensation Act, which is MSA 17.237(611) et seq, which contains numerous provisions dealing specifically with the Accident Fund — see, for example, 17.237(701) et seq — and allows that the fund is (24) "created to provide workmen's compensation insurance for employers under the supervision of the Commissioner of Insurance," directly from that section, (701).

There can be no doubt that these state statutes comprise a complex regulatory scheme for the insurance industry, including worker's compensation, and specifically, the Accident Fund. The state's implementation of this complex reg-

ulatory scheme convinces me that the State of Michigan has an overriding interest in the protection of its citizens from the effects of an unregulated insurance industry in this state. Thus, the first factor of the Burford doctrine is satisfied in my opinion.

Interestingly enough, and turning back to Construction, however, I find a distinction that I had not before seen, and that distinction appears on page 93 of the Federal Reporter System 2nd Series, in Volume 573, wherein the Second Circuit draws a distinction between Burford abstentions where there is a complex federal scheme and where there is not.

For example, in Construction there was a complex federal scheme of regulation of seamen in and out of the Commonwealth of Puerto Rico. The Court made particular note of that at page 93 in saying that the area of seamen's accident compensation hardly can be characterized as a peculiarly local domain; rather, under the Jones Act and the (25) Maritime Law of Seaworthiness, federal regulation predominates and ordinarily is exclusive. Nor could a declaratory judgment vindicating Construction's Velez' claim be deemed a disruptive influence on local law.

What the Court is saying in the latter part of that is that the Court itself had decided this issue. That is to say, the Second Federal Circuit Court had decided this issue in Velez. The Court then asks in a very clear language how could this be disruptive when we ourselves have decided the issue in the first place, and in the second place, reversing the order, how is it possible that a federal scheme of accident compensation is peculiarly local in domain.

Well, there is no federal regulatory scheme as to the State Accident Fund. It is purely local. There are federal claims made as I have cited, but they do not set forth complex regulatory schemes, but, rather, state complicated regulatory schemes. An interesting distinction that I had not noticed and nor had I thought of it.

By the way, apocryphal, it is also obvious to me that the same thing was true in Ada-Cascade. We were dealing with a complex federal interest in waste hazard disposition, both

federal and state, which may make one wonder about the underlying soundness of the decision if the Second Circuit correctly states the law as the Supreme Court says it is. But the Sixth Circuit is not the Second Circuit, and I (26) note that in both Ada-Cascade and in Construction a complex federal regulatory scheme was involved.

Plaintiffs argue today and in their brief in opposition to abstention under Burford that the decision as to whether the Accident Fund is a state agency will not have ramifications beyond the case at bar. With this contention, I heartily disagree. To the large number of companies which obtain their worker's compensation insurance from the Accident Fund, or which might consider doing so in the future — as well as the present and future employees of the Fund — the status of the Fund as a state agency or non-state agency, or even quasi-state agency, is of considerable import and impact.

Indeed, it is conceivable to me that a ruling on that question could change the entire worker's compensation insurance industry in the state of Michigan. I note, for example, in the defendants' brief opposing abstention — or maybe not. It is hard to say — a comment that seems to me to be evident. On page six of that brief, the defendants argue that, moreover, a speedy decision would facilitate such questions as rate setting, employee status, dividend payments, and other similar management decisions, end quote, from the brief. And I say simply, of course, it will, and that is why Burford is directly involved in my judgment because underlying this issue are the significant questions of rate setting, of dividend payments, of whether or not premiums for retirement (27) benefits ought to come from state funds or from the Accident Fund itself, et cetera.

Likewise, I do not agree with the plaintiffs that the fact that the Michigan Supreme Court at one time refused to consider the questions certified to it by this Court is any indication that the state law questions presented here are not of significance and particular importance to a massive public policy that has been set by this state.

The extensive statutory regulation of this industry, not to mention the rather extensive publicity generated by this lawsuit, belie in my opinion that argument. Plaintiffs additionally attempt to distinguish this case from Ada-Cascade by arguing that no complex regulatory scheme or coherent policy of the state is being challenged or affected in this case, and I disagree. Although this may not appear to be the more typical type of Burford case which involves a challenge to a rate set under a complex regulatory scheme, or even a challenge to the interpretation of a policy clause in an insurance policy, I believe it to be a distinction without a difference.

What is, in effect, being challenged here is the Insurance Commissioner's authority to run or regulate the Accident Fund. This includes exercising the powers purportedly conferred upon the Commissioner by Michigan statute, which is part of the complex regulatory scheme involving the insurance (28) industry in Michigan.

In fact, questions as to the Commissioner's authority to take actions such as setting rates without consulting with or seeking the approval of the Fund's advisory board have been raised consistently in hearings in this court throughout the proceedings involved in this case.

As to plaintiffs' argument that this case does not involve a matter of substantial public concern over which the state is attempting to develop a coherent policy, little need be said. It is obvious to me, and I think to plaintiffs, that the status of the Fund is a matter of substantial public concern, and that the state is attempting to develop a coherent policy toward regulation of that entity as well as the entire state insurance industry. In fact, it seems that this lawsuit arose because of the state's attempts in that direction. None of the arguments advanced by plaintiffs or defendants dissuade me from my conclusion that the first factor of the Burford test is met herein.

Additionally, I pick up for one of the several times that I have picked up the Construction case because it does such

a nice job of reviewing the Supreme Court of the United States with regard to the issue of Burford-type abstention, and note that in Construction, although at a page I have not marked, the developing state policy is a noted point with regard to a Burford abstention. Another way (29) of saying that is something that I think I have already said, and that is, when you make the argument made by counsel with regard to disruption and with regard to complex schemes, Burford itself talks about — maybe Burford doesn't. Maybe it is Colorado River — talks about the fact that if a federal court reviews a question in a case which would be solely disruptive of the state efforts to establish a coherent policy with respect to a matter of substantial public concern, that is enough. It seems to me relatively easy to find that there is a state question and a disruption of the efforts of the insurance commissioner and the Attorney General to establish a coherent policy with regard to the state Accident Fund if not with regard to anything else.

The second Burford factor, or third as it is argued by some people, is the existence of a state-created forum with specialized competence in the particular area. The factor in the instant case is easily satisfied if one is required to follow Ada-Cascade, which of course I am, and that is found at MSA 24.1244, or MCLA 500.244. It reads in one sentence, as follows:

> "Any final order or decision made, issued, or executed by the Commissioner under this insurance code shall be subject to review, after hearing had before the commissioner or a deputy commissioner without leave by the circuit court of Ingham County (30) or the circuit court of the county in which the principal office in this state of the insurer aggrieved by such order or decision is located, or where the person resides against whom such order is directed."

The interesting part of that language is that it contains the word "shall" with regard to where to bring the action although it leaves alternative places for one to bring an action. As in Ada-Cascade, because the statute is phrased in

the alternative, my initial reaction as I indicated earlier was that it did not fit within the Burford test. However, when I compare it with Ada-Cascade, I find the two statutes are almost identical. The statute relied upon by the Sixth Circuit is also phrased in the alternative, a fact, oddly enough, recognized by the Court itself in footnote five on page 17. That statute says, quote:

> "If the department finds that a person is in violation of a permit, license, rule promulgated under this act, or requirement of this act, the department may issue an order requiring the person to comply with the permit, license, rule, or requirement of this act. The attorney general or a person may commence a civil action against a person, the department, or a health department certified under section 45 for appropriate relief, (31) including injunctive relief for a violation of this act or a rule promulgated under this act. An action under this subsection may be brought in the circuit court for the county of Ingham or for the county in which the defendant is located, resides, or is doing business," end quote in part.

That is MCLA 299.548.

I have read Ada-Cascade a number of times, and I thought maybe Judge Keith had missed the import of the alternative language. When I found the footnote, which is accurate and indicates the alternative nature of the Michigan statute, and while I might not make the same decision, I am bound by that decision of Judge Keith and his majority. He views correctly or incorrectly the Ingham County Circuit Court to be the state-created forum with specialized competence in the particular area.

One I suppose could argue that that is not so, that it is merely the location of Ingham County in the state capitol where all the state agencies are providing convenience to the litigants, particularly when both statutes are worded in the alternative. But Judge Keith has not found so, and Judge Keith's decision binds me.

I do note, however, that there is a state scheme which favors the inclusion of Ingham County in almost if not all state agency actions. The plaintiffs argued, for (32) example, in their brief that I received on Saturday that I should pay no attention to that among other reasons, in that they had requested a hearing and the hearing had been denied. Plaintiffs' counsel cited for me a section of the Judicature Act which in their opinion was relevant. It was 27A.671, and it talks about how you appeal an order of any state board, commission or agency, and you do so by bringing an action in Ingham County.

So it is a singular argument. Whenever you are aggrieved by a state agency whether it acts or whether it doesn't act, you go to the court in Ingham County either seeking mandamus to require the state commission to act, or in the alternative, under the revised Judicature Act, seeking a resolution in a different fashion.

There may, therefore, be some sense in the designation of Ingham County as a place with specialized knowledge with regard to a complex industry. The Sixth Circuit concluded that this statute manifested a desire by the state of Michigan to create a coherent policy in hazardous waste management by centralizing judicial review in Ingham County Circuit Court, and the same must be said in this instant case. The state of Michigan has manifested a desire that orders issued by the insurance commissioner be reviewed in Ingham County Circuit Court, and other places, thus indicating that questions of interpretation of the (33) statutes involved should first be addressed to that forum. The second factor of Burford has, therefore, been satisfied by judicial decision of the Sixth Circuit Court of Appeals.

I do not find plaintiffs' argument that the fact that the Insurance Commissioner refused to grant them a hearing and the Michigan Supreme Court at one time declined to consider questions certified from this Court somehow takes this case outside the second factor of Burford, or the third factor of Burford.

Plaintiffs' remedy for the Commissioner's refusal to grant a hearing is to attempt to seek review under the cited statute on the grounds of that refusal, or to seek an order compelling a hearing before the Commissioner, not to file necessarily a suit in federal court.

As to the certified question argument which I have already addressed, I reiterate that that act by the Michigan Supreme Court simply has no relevance to the question of whether this case should be decided by this Court. Likewise, it has no relevance to the question of whether the action should have been filed in Ingham County Circuit Court.

The Sixth Circuit quoted Colorado River for the proposition that it is sufficient that exercise of federal review of the question could be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial concern, and concluded that it was, quote, (34) "ill-equipped to review state rules and regulations which have an entirely local effect." Ada-Cascade at page 18 of the slip opinion. The same may be said in this case.

A determination by this Court as to how the Insurance Commissioner is authorized to regulate the Accident Fund is surely disruptive of the efforts of the Commissioner and the Attorney General to establish a coherent policy with respect to the Fund, and I have already opined that it is a matter of substantial concern.

This conclusion is buttressed by the fact that there are at least two other actions that I am aware of pending in courts involved or located in this state, and possibly three, at this very moment. One of course was addressed by the lawyers this morning, and that was a federal court case filed in the Eastern District of Michigan which has been assigned to Judge Newblatt and which is brought by the member insureds claiming interest in the Fund. Another is a matter in the Livingston County court briefed by the defendant, defendants, this morning, and filed by competitor insurers with regard to the Commissioner's action in reducing rates a couple of months ago, or some such time as that; and a

possible third suit when a magistrate called me from the Eastern District of Michigan last week asking about why he has been assigned a purely state issue involving the state Accident Fund. What that magistrate was referring to, I (35) don't know.

He may have been referring to the Newblatt case, but I seriously doubt it, for his locus was far from Flint. I simply don't know, but I know that there is litigation. I know that there are issues being addressed to the Commissioner and that will continue to be addressed to the Commissioner. It is apparent to me that these actions are a serious disruption of the statutory scheme for regulation and review established by the Michigan legislature.

Furthermore, it cannot be denied that an erroneous federal court decision on these actions would seriously impair the state efforts to implement its policies regarding the insurance industry in general and the worker's compensation insurance in particular. Federal courts are ill-equipped to review Michigan rules and regulations to determine these issues of local concern.

In sum, I believe that the Burford test as applied by the Sixth Circuit in Ada-Cascade in November has been met, and I feel that I should, and must, abstain for Burford-type of reasons as well as for Pullman-type of reasons. The Sixth Circuit's mandate in Ada-Cascade leads me to that conclusion, as do notions of federalism and comity underlying them, principles which have long troubled me in conducting the proceedings in this lawsuit, that this abstention decision is well taken. That the dispositive issue (36) involved — the status of the Accident Fund — should be decided by the courts of the state which promulgated that statutes in the first place creating out of nothing and then regulating the Fund; which houses the legislature whose intent must be ascertained in resolving this issue; and an officer of which is the Attorney General who issued the ruling which ultimately led to this lawsuit, has long been a belief of this Court.

Now it appears that the Sixth Circuit has compelled me, at least with the second portion of Burford, to act on that

belief. The Court believes as I have indicated before that if I abstained on Burford grounds and upon Pullman grounds I am required to dismiss the case with prejudice, which puts it in a posture for appeal to the Sixth Circuit immediately. It would be nonsensical to do otherwise. To abstain on Pullman grounds, which is to remand the case to circuit court, or to the state court in this case of Ingham County, because it appears to me at least the parties on both sides of the case would have to be grounded in Ingham County — to do what while also deciding that Burford, in utilizing my discretion, convinces me that there should also be a dismissal is to put the parties in two different courts at one time. There is no sense to that whatsoever.

As indicated by the lawyers this morning, this ruling should I decide to abstain will be appealed. I believe (37) that. I believe, not having said that it is a final order of the court, and one doesn't have to worry about, or the lawyers do not have to worry about questions of certification of interlocutory nature, that it is ripe for appeal as soon as I sign an order which indicates my abstention today.

While I have used the word "mandate," I use it with caution. That is the word used by Judge Keith to me when he said on page 18 of his majority opinion that he was adhering with the majority to the mandate enunciated in Burford.

He at the same paragraph at the same time then instructed me to dismiss on grounds of abstention, which might lead some to believe that I believe that I have no discretion in the case at hand. That is not the case.

The only thing that I believe is, with regard to the interpretation of Michigan statutes in a state created forum with specialized competence in the particular area, is a matter of adjudication with which I cannot disagree.

I do not believe that I have no discretion when considering the Buford doctrine.

That is only an interpretive aspect which I am adding now by way of, kind of a footnote in this oral and, perhaps, rambling opinion that I have just delivered.

The summary of what I have said is that I abstain on two grounds, the so-called Pullman ground and the so-called Burford ground. It is my belief that once I sign a (38) judgment to that effect that will become an immediately appealable order for either or both sides. I will issue such an order sometime in the next day or two. I am ready to adjourn unless the lawyers have something further they want the Court to pay attention to now. There are two people up at the same time. Mr. Nerat.

MR. NERAT: I do have, Your Honor, for the Court two things. One, in your comment you indicated that under Burford you would be dismissing with prejudice. Now I would just ask you to look at that because my impression is that if there is a dismissal under Burford we could then bring the same claims, including these constitutional claims, in the state forum, and when we go to the state forum, if and when we did, we would then be met with a res judicata argument that you have already been dismissed with prejudice. So I think it should be without prejudice.

THE COURT: I think you have some — I am not going to do either one. I am just going to dismiss. I think you have an interesting argument. What I was referring to, Mr. Nerat, was — I am not going to look back for it now. There was some case authority that said that a Burford dismissal was without prejudice, and then on turning to Wright and Miller it says where a court abstains under both Pullman and under Burford there should be, the case shall be dismissed, but — I don't know that Wright and Miller used the (39) words with prejudice. I know Wright and Miller did not use the words without prejudice. I am simply going to sign the order saying dismissed. I am not going to utilize language such as with prejudice or without prejudice, and let the Court of Appeals interpret that, or the state court, as they want. That was a cursory review on my part of Wright and Miller after I had come to, it seemed to me, an insurmountable conclusion that I was going to have to exercise Burford abstention. I can say no more than that. My order will say the case is dismissed, will say nothing more.

MR. NERAT: Thank you very much, Sir. One other point. I think in oral argument — if you are inclined to dismiss on account of Burford, I think that we would request an opportunity to seek interim relief pending an appeal, and Mr. Swift is prepared to request that and argue that to the Court. It is not somethng that I think can be done in a few minutes, and we are at your pleasure on that.

THE COURT: It is 1:30, and of course my initial reaction to that would be that having dismissed the case is dismissed. Maybe I ought to give it some thought.

MR. NERAT: We have some authority to cite you in that regard, Sir, that you would still have jurisdiction, have some powers to regulate the parties while the matter is pending on appeal.

THE COURT: Have you that in legal memorandum form?

(40)

MR. NERAT: No, Sir, I am not in a position to submit it to the Court, but I turn that over to Mr. Swift at this juncture.

THE COURT: Don't argue the whole thing, Mr. Swift. I am trying to think to think when I can accommodate you, and when I can hear you. Why don't we do this? You people have been put to a lot of pressure in the last three days as have I. Would you be able to deliver a memorandum plus argue tomorrow by 8:30? YOu can go off the record.

(Off-the-record discussion.)

THE COURT: On the record.

MR. SWIFT: May it please the Court, Theodore W. Swift, not heard from in any earlier proceedings today. Very briefly stated, in light of your decision to abstain both as to Burford and as to Pullman, we concur that this is a final judgment, and we would then turn to Rule 62(c) and offer to you on a motion for injunction.

Briefly, that rule says when an appeal is taken from a final judgment denying an injunction — you will recall that,

that this complaint asked for an injunction — the Court in its discretion may grant an injunction during the pendency of the appeal upon such terms as it considers proper for the security of the rights of the adverse party. Now the question is, that you properly raise and an interesting one, having abstained do you have any jurisdiction then to issue any (41) kind of injunctive order as it would appear that you have under Rule 62(c).

In our view abstention does not signify or equate with lack of subject matter jurisdiction, and I don't understand the Court to argue with that. I think you are saying that you have jurisdiction, but you just choose in your discretion, given these rules, not to exercise it. Here the Court, we would submit, clearly has jurisdiction. I won't repeat it. The articles are named in our complaint, and the statute that you cited, and Moore's Federal Practice — by abstaining, the court is not abdicating jurisdiction, only deferring. That is Moore's Federal Practice, Part Two, Section 0.203(1), page 2103.

THE COURT: Would you give me that cite from Moore again? 0.203?

MR. SWIFT: 0.203(1), page 2103. And that says abstention is still an act of discretion. It is not a finding of no subject matter jurisdiction. Then quickly as I promised, I refer the Court to the case — and there are a paucity of cases on this issue — the leading case or the case that I rely on is Williams vs. Red Bank Board of Education, 508 Fed. Supp. 989, a 1981 case.

THE COURT: From what district is that?

MR. SWIFT: I believe that is the New Jersey District Court, but I —

(42)

THE COURT: Well, I will find it.

MR. SWIFT: I have got it in a minute. It is just the District of New Jersey. It was an abstention case involving a teacher tenure proceeding where the teacher — it involves

almost a Younger type of case — the teacher had charges preferred under tenure proceedings, and she came to the federal court, sought to enjoin those proceedings, and the court refused. So then she came back and asked for what I am asking you today, and injunction under 62(c). The court denied it.

I would not want to mislead this court. They did not give the injunction. What is interesting is at page 991 of that decision. The court said, and I quote:

"The court clearly has jurisdiction to grant the relief requested."

That it seems to me places us exactly where we are today. You have abstained, yet as that court had done, but that court found that it clearly had jurisdiction to issue an injunctive order. And then the Court went on to apply what standards would they apply in order to invoke — again discretionary of course. They would apply the same standard as they normally would for issuing an injunction with one significant difference. You do not have to show as that court found a strong likelihood of success. As the court points out, it is a little difficult for me to stand in front (43) of you, a district judge who has just disposed of my remains, and then ask you to say that I have a substantial likelihood of reversing. You are not going to buy that, and I am not going to be that ludicrous to suggest that you are wrong, although I in all confidence believe, Sir, you are.

Instead, it says that the standard changes — there should be some likelihood of success. And I think that, Your Honor, the way that you have agonized over this weekend indicates to me that there is some likelihood of success.

I think the Sixth Circuit in Ada is simply wrong, and I believe in your heart you believe they are wrong, too. And I am willing to take that up, and I think there is some likelihood of our success. So that is the first standard.

The others are pretty fundamental, that there will be an irreparable injury unless the injunction is granted, that other persons will not be substantially harmed by an injunction, and that the public interest is not disserved by the injunction. I suggest we qualify under all counts.

We have more than some likelihood of success on the abstention issue. I think we can look on the second issue of irreparable harm — just considering the agony that we have put this court to and ourselves in the last three months coming down here. But there is another matter still in front of you today — if you had reached it. Who gets to (44) communicate with the insureds? This is a constant pressure-cooker. We would like the status quo preserved. I would suggest that there is nobody going to be harmed by an injunction pending an appeal, and we will process that immediately, and simply the status quo will be maintained, and aver that no public interest will be disserved. The public in fact deserves to have this decided and deserves to have it decided upon the status quo, not what will be three months from now.

The only other case that I could cite to Your Honor is the case of Armstrong vs. Board of Education in the city of Birmingham, 323 Federal 2nd 333, a 1963 decision out of the Fifth Circuit Court of Appeals. This was a desegregation civil rights case where the district court had abstained. Again I don't think that, at least, it was that defined as to whether it was a Burford situation, but it sounds like it, and it feels like it in that the district judge deferred to an administrative remedy that was available to aggrieved blacks who were claiming that they were being segregated out of the Birmingham system. Having abstained, he also refused to give any injunctive relief.

The appellants there went to the Fifth Circuit and asked for the injunction even though the abstention had been given, and the Fifth Circuit granted that. In fact, it was a Younger type of abstention. This was a 1983 case, as (45) is ours. I think that there is precedent then, Your Honor, with those two cases, and that we are deserving, especially in light of the catastrophic circumstances which have hit us at this late stage.

If there is any equity to be had, I think we need it here. What we would ask is that we ask the Court to grant the injunction that we requested on October 4, 1983, absent

paragraph "e," which is now moot, and with the ending of paragraph "a," after the word "monies." Thank you, Your Honor. I know that I extended the time, but I —

THE COURT: That is all right. I doubt if, if you state people are ready to respond to that. You haven't had a chance to look at the case.

MR. IWASKO: Absolutely not, Your Honor.

THE COURT: The Court will take the motion under advisement, and I don't know how best to accommodate the parties, but what I would suggest is if anyone wants to cite more law to the Court during the day today or very early tomorrow morning, I would look at it, and then take up arguments from the plaintiffs and the defendants tomorrow morning at, say, nine o'clock. I am not asking anyone to file any briefs.

I am simply asking that anyone who is interested supply the Court with any authority on Rule 62 or federal cases or otherwise if they find any, and the Court (46) will conduct its own independent research this afternoon and evening, and listen to arguments tomorrow morning. That is the only thing that seems to me fair to do. I will adjourn this until nine a.m. tomorrow.

MR. IWASKO: Your Honor, could I speak for a second? There is a real problem for us because we have no means of doing anything but looking at the rule. This has taken us by complete surprise. We weren't prepared for a possibility of an argument such as this. Is it possible that we could have a day because we would like to go back to our offices and do our research?

(Off-the-record discussion.)

THE COURT: Let me leave the bench and take a look at scheduling problems and see if I can set up a schedule that makes sense to both of you, and talking to my secretary, and finding out what to do. Whatever word comes back, it will just come back through Ms. Chapman. I will set up something and send it back in to you, and I don't think that you need to stay for that.

(Whereupon, 1:35 p.m., the record was concluded.)

- - -

(47)

REPORTER'S CERTIFICATE

I, Jarratt W. Martin, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Jarratt W. Martin, RPR-CM
U. S. District Court Reporter
Federal Building
410 West Michigan Avenue
Kalamazoo, MI 49005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Accident Fund, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA10 (First Extra Session) Part V, Sec. 1; 1915 CL 5477, Ward Ellison and Max Grost, individually, Elston-Richards Storage Company and Russell Jameson, individually,
Plaintiffs,

v

File No. G 81-224

Nancy A. Baerwaldt, Commissioner of Insurance of the State of Michigan; Silveria O. Kanoyton, Personnel Director of the State of Michigan; John Heueni, Director of the Department of Licensing and Regulation of the State of Michigan; Loren Monroe, Treasurer of the State of Michigan; Gerald Miller, Director of Management and Budget of the State of Michigan, and Michigan Civil Service Commission,
Defendants.

OPINION ON ABSTENTION

The creation of Plaintiff Accident Fund was authorized by state statute in 1912 as an alternative form of worker's compensation insurance for employers in the State of Michigan. The Fund was to be administered by the State Insurance Commissioner, who was responsible for levying, collecting, and disbursing premiums and dividends for the Fund, employing deputies, assistants, and clerical help (as authorized by the Board of State Auditors) necessary to

administer the monies of the Fund, and terminating the employment of any employee of the Fund. Monies collected by the Fund, which was to be "neither more nor less than self-supporting", were to be held in the State treasury. A civil action in the name of the State as Plaintiff could be maintained to collect unpaid contributions, premiums, or assessments levied by the Commissioner, and to compel an employer to allow inspection by the Commissioner of its books, records, and payrolls. Neither the Commissioner nor the State of Michigan was to become liable for payment of compensation claims beyond the extent of collected Accident Fund monies. 1912 PA 10 (First Extra Session), Part V, §§1-9. This statutory framework, with a few minor permutations, has existed up to and including the present enabling legislation. MCLA 418.701 *et seq;* MSA 17.237(701) *et seq.*[1]

It appears that the Accident Fund has operated effectively since its inception. Plaintiffs contend this operation has been as an independent entity, with little or no involvement by the Insurance Commissioner. In 1977, however, in response to a 1976 Michigan Attorney General decision opining the Fund to be an agency of the State subject to the constitutional and statutory regulations applicable to all state agencies, *Opinion of Attorney General No. 5147* (December 7, 1976), the Commissioner issued directives designed to, *inter alia*, integrate the Fund and its employees into the state civil service and retirement systems, and place the Commissioner in a position of management control. The

[1] Noteworthy are MCLA 418.701; MSA 17.237(701), which provides that the Accident Fund is to be supervised by the Commissioner of Insurance, and that the Commissioner is to promulgate rules regulating the qualifications of employers wishing to become employer-members; MCLA 418.741; MSA 17.237(741), providing that the Fund's "Advisory Board" (consisting of employer-members certified by the governor to serve one-year terms for the purpose of advising the Commissioner regarding the administration of the Fund) is to authorize the employees selected by the Insurance Commissioner; and MCLA 418.751; MSA 17.237(751), which authorizes the Commissioner to make the final judgment as to whether it is "necessary to dissolve the Accident Fund".

Fund objected to these directives by letter, and requested a hearing before the Commissioner, which was denied. The instant lawsuit ensued.

Seeking injunctive and declaratory relief, Plaintiffs allege the deprivation under color of state law of their rights, privileges, and immunities under the United States Constitution and federal statutes; specifically the Impairment of Contracts Clause of Article 1, Section 10 of the United States Constitution, the Due Process and Just Compensation Clauses of the Fifth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, 42 USC 1983, and the Employee Retirement Income Security Act of 1974 (29 USC 1001 *et seq*).[2] Pivotal to a resolution of these claims is a determination as to whether the Accident Fund is an agency or instrumentality of the State of Michigan, a question never addressed by the Michigan courts. This determination will be made by reference to Michigan statutes, legislative history, Attorney General Opinions, and any Michigan case law analogously relevant. Believing this matter to be one which should be resolved in the state courts, I have decided to exercise my discretion and refrain from consideration of this lawsuit on grounds of abstention.[3]

As stated by the United States Supreme Court:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District

---

[2] The Complaint was brought by the Accident Fund, named employees, and named member-insureds. By Consent Judgment filed January 9, 1984, the due process and just compensation claims of the Fund, Elston-Richards Storage Company, and Russell Jameson, only, have been resolved. All other constitutional claims remain.

[3] An oral Opinion abstaining from consideration of this lawsuit was delivered from the Bench on January 9, 1984. A Judgment Order of Dismissal was entered on January 24, 1984. This Opinion follows.

Court to adjudicate the controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District* v *United States*, 424 US 800, 813, 96 S Ct 1236, 47 L Ed 2d 483 (1975) - quoting from *County of Allegheny* v *Frank Mashuda Company*, 360 US 185, 188-189, 79 S Ct 1060, 3 L Ed 2d 1163 (1959).

There are three general categories of circumstances appropriate for exercise of the doctrine of abstention, with the Supreme Court recognizing a fourth with apparent approval. Only two of these categories are of interest to the instant action.[4]

The oldest form of abstention was recognized by the Supreme Court in *Railroad Commission* v *Pullman Company*, 312 US 496, 61 S Ct 643, 85 L Ed 971 (1941). There, the court held that abstention may be appropriate where a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent, and ambiguous, state law. The case involved an order issued by the Texas Railroad Commission requiring Pullman conductors to operate sleeping cars on state railroad lines.

---

[4] The so-called "*Younger*" doctrine involves abstention in cases wherein a party seeks to restrain pending state criminal proceedings. The category has been extended to involve pending state nuisance proceedings antecedent to a criminal prosecution, and pending state proceedings for the collection of state taxes. *Younger* v *Harris*, 401 US 37, 91 S Ct 746, 27 L Ed 2d 669 (1971). *See also, Colorado River, supra* at 424 US 816, and cases cited therein.

The "fourth" form of abstention, recognized only informally by the Supreme Court, involves cases where there is a contemporaneous action pending in state or federal court; dismissal being justified on grounds of "wise judicial administration". *See Colorado River, supra* at 424 US 817-818.

Since the instant case does not involve a pending state or federal court action fitting within the parameters of these doctrines, abstention on either ground would be inappropriate.

The order was challenged on grounds that it was unauthorized by Texas law as well as violative of the Equal Protection, Due Process, and Commerce Clauses of the United States Constitution. Recognizing that a determination that there was no authority in state law for the Commission's order would end the litigation without the constitutional issue having arisen, the court remanded the cause to the district court with directions to retain the case, but to abstain pending a state court determination of the state law question. In reaching this decision, the court relied upon notions of comity, stating in part:

> The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the Supreme Court of Texas. . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, . . . [Case law reflects] a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. *Id* at 312 US 499-501 (citations omitted).

See also, Colorado River, supra at 424 US 814; *County of Allegheny, supra* at 360 US 189; *United States* v *Anderson County, Tennessee*, 705 F 2d 184 (CA 6 1983); *Ada-Cascade Watch Company* v *Cascade Resource Recovery*, 720 F 2d 897, 902 (CA 6 1983), and cases cited therein.

The instant action fits squarely within the letter and spirit of the *Pullman* doctrine. Although Plaintiffs have phrased much of their cause of action in federal constitutional terms, the threshold question is whether the Accident Fund is a state agency or instrumentality; a question of state law interpretation. State law on this issue, as Plaintiffs

freely admit, is ambiguous. Furthermore, since the propriety, and thus the constitutionality, of the directives issued by the Insurance Commissioner depends upon a determination as to the state agency or instrumentality status of the Fund, the requisite federal constitutional claims which might be mooted or presented in a different posture by a state court determination of pertinent state law are present. Being mindful of the rightful independence of the State of Michigan in regulating its insurance industry, and in an effort to avoid needless friction with state policies in that regard, I am exercising my discretion and abstaining on *Pullman* grounds from consideration of Plaintiffs' constitutional claims.

However, the *Pullman* doctrine is not the sole basis for my decision to abstain. An additional category of abstention, recognized by the Supreme Court in *Burford* v *Sun Oil Company*, 319 US 315, 63 S Ct 1098, 87 L Ed 1424 (1943), is equally applicable herein.

Burford involved an attack upon the validity of an order of the Texas Railroad Commission granting petitioner a permit to drill several oil wells. Jurisdiction was invoked on diversity and federal question grounds, the federal question being a constitutional due process challenge to the order. The court, after recognizing that abstention may be appropriate both in cases of diversity and federal question jurisdiction, held that the federal court should have abstained from the case on the ground that the issues involved concerned a specialized aspect of a complicated regulatory system of local law, which should have been resolved by specialized local administrative bodies and courts.[5]

[5] Unlike the *Pullman*-type of abstention where the court merely stays proceedings pending a state court determination, abstention under the *Burford* doctrine results in dismissal of the action. *See, e.g., Nasser* v *City of Homewood*, 671 F 2d 432 (CA 11 1982). Where abstention is justified on both *Pullman* and *Burford* grounds, the action should likewise be dismissed. Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 17, §4245.

As in *Pullman*, abstention under the *Burford* rationale involves principles of comity. *See County of Allegheny, supra* at 360 US 189. Abstention is deemed appropriate in cases involving "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case" at bar. It is sometimes considered sufficient that the exercise of federal review of a state law question in a particular case and in similar cases would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River, supra* at 424 US 814. However, the mere possibility that resolution of a federal question may result in the overturning of a state policy, withour more, is generally insufficient to justify abstention under *Burford*. *Ada-Cascade, supra* at 903; *Zablocki* v *Redhail*, 434 US 374, 380 fn. 5, 98 S Ct 673, 54 L Ed 2d 618 (1978). *See also, Construction Aggregates Corporation* v *Rivera de Vicenty*, 573 F 2d 86 (CA 2 1978) for an interesting discussion of the history and policies behind *Burford*-type abstention.

The *Burford* doctrine was recently addressed in *Ada-Cascade, supra*, wherein the Sixth Circuit was asked to review this Court's grant of summary judgment for defendants in a dispute over the construction of a facility for the disposal of hazardous waste products. It was asserted that construction of the facility violated the Federal Resource Conservation and Recovery Act, 42 USC 6901 *et seq*, because the facility failed to obtain all necessary state environmental permits as required by the Act. A decision as to compliance with state environmental permit regulations was dispositive of the federal statutory issue. The Sixth Circuit, in a majority opinion relying on *Burford*, abstained from consideration of the issues presented on appeal, and remanded to this Court with instructions to dismiss on grounds of abstention.

In reaching this decision, the majority recognized that two factors must be present before abstention under *Burford*

is appropriate: (1) "a complex state regulatory scheme which would be disrupted by federal court review", and (2) " a state-created forum with specialized competence in the particular area." *Ada-Cascade, supra* at 903 - citing *Burford, supra* at 319 US 327, 332-333.

In addressing the first *Burford* factor, the majority found that the State of Michigan has an "overriding interest in the protection of its environment from the effects of unregulated waste", *Ada-Cascade, supra* at 904. The majority went on to briefly examine the permit approval process involved in the construction of hazardous waste facilities in Michigan, concluding that the state had developed a "complex and systematic" regulation process which enabled it to "implement a consistent and coherent state policy toward hazardous waste facilities in the state", and which would be disrupted by federal court review. *Ada-Cascade, supra* at 905. That a federal court was "ill-equipped to review state rules and regulations which have an entirely local effect", was an important consideration to the majority in reaching this conclusion. *Ada-Cascade, supra* at 906. Because the State of Michigan has centralized judicial review of its hazardous waste facility regulation process in the Ingham County Circuit Court, the *Ada-Cascade* majority also found the second *Burford* requirement of a specialized state-created forum to have been satisfied. *Ada-Cascade, supra* at 905.

Applying these principles to the instant case leads me to conclude that the factors necessary for appropriate exercise of *Burford*-type abstention are also present herein.

The State of Michigan has promulgated extensive legislation regulating the insurance industry in the state; the Insurance Code of 1956 in fact consisting of more than a full volume of the Michigan Statutes Annotated. MCLA 500.100 *et seq;* MSA 24.1100 *et seq.* The Code's statement of purpose makes specific reference to the Accident Fund. Moreover, the state's Worker's Disability Compensation Act

contains numerous sections dealing exclusively with the operation and regulation of the Fund. MCLA 418.611 *et seq;* MSA 17.237(611) *et seq.;* specifically MCLA 418.701 *et seq,* MSA 17.237(701) *et seq.* There can be no doubt that these statutes comprise a complex regulatory scheme for the state's insurance industry, including worker's compensation and, specifically, the Accident Fund. The enactment of this regulatory scheme demonstrates the state's overriding interest in protecting its citizens from the effects of an unregulated insurance industry; a matter of substantial public concern. Through this legislation, the state is attempting to enforce a coherent and consistent state policy toward regulation of that industry.[6]

It is obvious that interference by this Court with efforts of the Insurance Commissioner and other state officials to discharge their supposed official duties, including regulation and supervision of the Accident Fund, would be disruptive of the state's efforts to enforce its policy toward regulating the insurance industry. Involved in this action are complex issues concerning the legal status of the Accident Fund, and the degree of authority over that entity intended by the legislature to be conferred upon the Insurance Commissioner. Questions as to rate setting, dividend payments, retirement benefits, employee status, and other management decisions hinge upon the resolution of those issues; issues which a federal court is ill-equipped to resolve. The potential

[6] Plaintiffs argue that the fact that the Michigan Supreme Court at one time refused to address certified questions from this Court regarding the state agency status of the Accident Fund indicates that the state law questions presented herein are not of particular public importance in the State. The extensive statutory regulation of the insurance industry, as well as the significant amount of publicity generated by this lawsuit, belie this argument. Moreover, the reasons for the Supreme Court's refusal to address these questions, which are unknown to this Court and to the parties, may be many and varied. It certainly cannot be interpreted as an indication as to the public importance of the issues involved. The refusal of the certified questions has no relevance to the issue of whether this case should be decided by this Court, or should instead have been filed and resolved in state court.

ramifications of a ruling on those issues are great. Indeed, it is conceivable that the overall nature of the worker's compensation insurance industry in the State of Michigan could be altered. This Court has been petitioned numerous times, during the course of these proceedings, to intercede in a variety of disputes between the Commissioner and the Fund. Moreover, there is at least one other federal action, and one state action, pending in Michigan involving the Accident Fund. These actions, and especially the instant action, represent a serious disruption of the regulatory scheme for the insurance industry established by the State of Michigan.

Had it not been for the Sixth Circuit's recent decision in *Ada-Cascade*, I may have concluded that the second *Burford* factor is not present in this case. The Insurance Code of Michigan provides, in relevant part:

> Any final order or decision made, issued, or executed by the commissioner under this insurance code shall be subject to review, after hearing had before the commissioner or a deputy commissioner without leave by the circuit court of Ingham County *or* the circuit court of the county in which the principal office in this state of the insurer aggrieved by such order or decision is located, or where the person resides against whom such order is directed. MCLA 500.244; MSA 24.1244 (emphasis added).

Because this statute is phrased in the alternative, my initial reaction was that it did not fit within the parameters of a state-created forum with specialized competence in this particular area. However, comparison with the statute cited in *Ada-Cascade* reveals that the two are almost identical. The statute providing for judicial review of decisions regarding hazardous waste management states that actions "may be brought in the circuit court for the County of Ingham *or* for the county in which the defendant is located, resides, or is doing business." MCLA 299.548; MSA 13.30(48) (emphasis added). The Sixth Circuit, after expressly recognizing the

alternative nature of this statute, found it to represent centralized judicial review in Ingham County Circuit Court. *Ada-Cascade, supra* at 905, fn. 5. The same must be said in the instant case since, although it is undisputed that a decision to abstain on *Burford* grounds is discretionary, I am bound by the Sixth Circuit's interpretation of this second factor. That the statute involved herein contains the word "shall" with regard to where an action is to be brought, while the statute in *Ada-Cascade* uses the word "may", strengthens my conclusion that the second *Burford* prerequisite is satisfied.[7]

Principles of comity, which have troubled me throughout my involvement in this action, convince me that abstention on *Burford* grounds is not only appropriate, but necessary. The Attorney General and Insurance Commissioner, whose actions ultimately led to the filing of this lawsuit, are officials of the State of Michigan. The legislature which promulgated the statutes creating and regulating the Accident Fund, and whose intent in doing so must be ascertained, is a creature of the State. Logic commands that the ultimate determination as to whether the Accident Fund is a state agency or instrumentality should be made in the state courts. Difficult state law questions are involved, in a matter of substantial concern to the people of Michigan. In an

---

[7] Noteworthy also are MCLA 600.671; MSA 27A.671, which provides for review of an order of any state board, commission or agency in Ingham County Circuit Court; and MCLA 418.751; MSA 17.237(751), which provides that disposition of the monies of the Accident Fund shall be under the direction of the Ingham County Circuit Court if the Fund is dissolved or the Chapter repealed. These statutes give further indication of the legislative intent that the Ingham County Circuit Court be a forum of specialized competence in this area.

I find no merit in Plaintiffs' argument that the fact that the Insurance Commissioner refused to grant them a hearing somehow takes this action outside of the second factor of *Burford*. Plaintiffs' remedy for that refusal was to seek review in Ingham County Circuit Court, under either MCLA 500.244; MSA 24.1244, or the general provisions of MCLA 600.671; MSA 27A.671. This action by the Commissioner is of no significance to the determination that there exists a specialized state-created forum.

effort to avoid disruption of state efforts to formulate and act upon its laws and policies in this regard, I am abstaining from consideration of this lawsuit, in its entirety.[8]

Because I am exercising my discretionary power to abstain on both *Pullman* and *Burford* grounds, this cause of action is dismissed.

DATED in Kalamazoo, MI: 2/2/84

(s) RICHARD A. ENSLEN
US District Judge

---

[8] As noted in my January 24, 1984 Opinion Denying Injunction Pending Appeal, a very recent United States Supreme Court decision may lend support, at least in spirit, to my decision to abstain, and in fact may raise questions as to this Court's jurisdiction to consider this case. Although I am without the full text of the opinion, it appears that the court in *Pennhurst State School and Hospital* v *Halderman*, _____ US _____ (docket no. 81-2101, decided January 23, 1984) held, based upon the Eleventh Amendment, that a district court is without authority to order state officials to conform their conduct to state law (the 1966 Pennsylvania Mental Health and Mental Retardation Act). As stated by Justice Powell for the majority: "It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." Since the instant action involves, in effect, allegations that state officials have not complied with state law (as it has been construed for many years), my decision to abstain would appear to parallel the *Pennhurst* majority reasoning.

1912 PA 10, Part V (First Extra Session)

PART V.

Administration by Commissioner of Insurance.

SECTION 1. Whenever five or more employers, who have become subject to the provisions of this act, and who have on their pay rolls an aggregate number of not less than three thousand employes, shall in writing request the Commissioner of Insurance so to do, he shall assume charge of levying and collection from them such premium and dividends as may from time to time be necessary to pay the sums which shall become due their employes, or dependents of their employes, as compensation under the provisions of this act, and also the expense of conducting the administration of such funds; and shall disburse the same to the persons entitled to receive such compensation under the provisions of this act: *Provided, however,* That neither the Commissioner of Insurance nor the State of Michigan shall become or be liable or responsible for the payment of claims for compensation under the provisions of this act beyond the extent of the funds so collected and received by him as hereinafter provided.

Proviso. liability.

SEC. 2. The Commissioner of Insurance shall immediately upon assuming the administration of the collection and disbursement of the moneys referred to in the preceding section, cause to be created in the State treasury a fund to be known as "accident fund." Each such employer shall contribute to this fund to the extent of such premiums or assessments as the commissioner shall deem necessary to pay the compensation accruing under this act to employes of such employers or to their dependents, which premiums and assessments shall be levied in the manner and proportion hereinafter set forth. The Commissioner of Insurance shall give a good and sufficient bond in the sum of twenty-five thousand dollars, executed by some surety company authorized to do business in the State of

Accident fund.

Formation of.

Surety bonds.

Michigan, covering the collection and disbursement of all moneys that may come into his hands under the provisions of this act. The premium on said bond shall be paid out of the general funds of the State on an order of the Auditor General. Said bond must be approved by the board of State auditors.

Intention as to fund.

SEC. 3. It is the intention that the amounts raised for such fund shall ultimately become neither more nor less than self-supporting, and the premiums or assessments levied for such purpose shall be subject to readjustment from time to time by the Commissioner of Insurance as may become necessary.

Classification of establishments.

SEC. 4. The Commissioner of Insurance may classify the establishments or works of such employers in groups in accordance with the nature of the business in which they are engaged and the probable risk of injury to their employes under existing conditions. He shall

Assessments determined.

determine the amount of the premiums or assessments which such employers shall pay to said accident fund, and may prescribe when and in what manner such premiums and assessments shall be paid, and may change the amount thereof both in respect to any or all of such employers from time to time, as circumstances may require, and the condition of their respective plants, establishments or places of work in respect to the safety of their employes may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable and just as among such employers. At the beginning of each fiscal year it shall be the duty of the Commissioner of Insurance to call for the required payment of premiums in such amounts as shall, together with any balance in the accident fund, in his judgment, and subject to the approval of said industrial accident board, be sufficient to enable him to pay all sums which may become due and payable to the employes of any such employer who has become subject to the provisions of part five of this act, and also the expenses of administering such funds during the following year.

Annual call.

Employers in default of assessment, etc.

SEC. 5. If any employer shall make default in the payment of any contribution, premium or assessment required as aforesaid by the Commissioner of Insurance, the sum due shall be collected by an action at law in the name of the State as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In case any injury happens to any of the workmen of such employer during the period of any default in the payment of any such premium, assessment or contribution, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman, or by his dependents in case death results from such accident, as if he had not elected to become subject to this act. In case, however, the amount actually collected in by such injured workman or his dependents shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of said accident fund. If the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this seciton shall have the choice, to be exercised before suit, of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the State for the benefit of the accident fund.

Injuries during default.

Employer may withdraw.

SEC. 6. Any employer subject to the provisions of part five of this act, who has complied with all the rules, regulations and demands of the industrial accident board and the Commissioner of Insurance, may withdraw therefrom at the expiration of the period of one year for which he has elected to become subject to the provisions of this act: *Provided, however,* That he shall give written notice of such withdrawal to said Commissioner of Insurance at least thirty days before

Proviso, notice.

Further proviso, existing liability.

the expiration of such period: And *Provided further*, That if at the time of such withdrawal liability may exist against employer for compensation to employes who have been theretofore killed or injured, as hereinbefore provided, such employer shall either relieve himself and the Commissioner of Insurance from such liability in the manner provided in part four, section four of this act, or shall otherwise protect and indemnify said Commissioner of Insurance against such liability in such reasonable manner as he may require.

In case of controversies.

SEC. 7. In case any controversy shall arise between the Commissioner of Insurance and any employer subject to the provisions of part five of this act, relative to any rule or regulation adopted by said Commissioner of Insurance, or any decision made by him in respect to the collection, administration and disbursement of such funds, or in case any controversy shall arise between any employe claiming compensation under the provisions of this act and said Commissioner of Insurance, all such controversies of every kind and nature shall be subject to review in like manner and with the same force and effect in all respects as is heretofore provided in respect to differences arising through the administration of such funds by the employer, or by a liability insurance company or by an employers' mutual insurance association.

Books, etc. open to inspection.

SEC. 8. The books, records and pay rolls of each employer subject to the provisions of part five of this act shall always be open to inspection by the Commissioner of Insurance, or his duly authorized agent or representative, for the purpose of ascertaining the correctness of the amount of the pay roll reported, the number of men employed, and such other information as said commissioner may require in the administration of said funds. Refusal on the part of any such employer to submit said books, records and payrolls for such inspection, shall subject the offending employer to a penalty of fifty dollars for each offense, to be collected by civil action in the name of the State and paid into

Penalty for refusal.

the accident fund, and the individual who shall personally give such refusal shall be guilty of a misdemeanor.

Commissioner to give and take receipts.

SEC. 9. The Commissioner of Insurance shall issue proper receipts for all moneys so collected and received from employers, as aforesaid, shall take receipts for all sums paid to employes for compensation under the provisions of this act, and shall keep full and complete records of all business transacted by him in the administration of such funds. He may employ such deputies and assistants and clerical help as may be necessary, and as the board of State auditors may authorize, for the proper administration of said funds and the performance of the duties imposed upon him by the provisions of this act, at such compensation as may be fixed by said board of State auditors, and may also remove them. The Commissioner of Insurance and such deputies and assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the board, but all such salaries and expenses so authorized by the provision of this act shall be charged to and paid out of said accident fund. He shall include in his annual report a full and correct statement of the administration of such fund, showing its financial status and outsanding obligations, the claims and the amount paid on each claim, claims not paid, claims contested and why, and general statistics in respect to all business transacted by him under the provisions of this act.

Deputies and assistants, compensation.

Expenses.

Annual accounting of fund.

Disbursements, how made.

SEC. 10. Disbursements from said accident fund shall be made only upon warrants approved by the board of State auditors upon vouchers therefor transmitted to it by the Commissioner of Insurance. If at any time there shall not be sufficient money in said fund wherewith to pay the same, the employer on account of whose workmen it was that such warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid, with interest thereon at the legal rate,

from the date of such payment to the date such next following contribution becomes payable, and if the amount of the credit shall exceed the amount of the contribution, he shall be repaid such excess.

Disposition of accident fund in case of repeal.

SEC. 11. If this act shall be thereafter repealed, all moneys which are in the accident fund at the time of such repeal shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard, however, to the obligation incurred and existing to pay compensation under the provisions of this act.

DISTRICT COURT DOCKET SHEETS

DIST. 646
OFF. 1
DOCKET YR. NUMBER 81 0224
FILING DATE 05/01/81
J 3
N/S 440
0 1
$ DEMAND Nearest $1,000 INJ/Declar.
JUDGE/MAG. NO. J 4609
COUNTY 26065
DOCKET YR. NUMBER ENSLEN G81-224

PLAINTIFFS

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA10 (First Extra Session) Part V, Sec. 1; 1915 CL 5477, WARD ELLISON and MAX GROST, Individually, ELSTON-RICHARDS STORAGE COMPANY and RUSSELL JAMESON, Individually

DEFENDANTS

#31 Sub: NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, ~~RICHARD A. ROSS~~, Personnel Director of the State of Michigan, and ~~WILLIAM S. BALLENGER~~, Director of the Department of Licensing and Regulation of the State of Michigan
#31 Substitution: SILVERIA O. KANOYTON and JOHN HEUENI
#31 Added as defts: LOREN MONROE, Treasurer of the State of Michigan, GERALD MILLER, Director of Management a Budget of the State of Michigan, MI CIVIL SERVICE COMMISSION (Ingham County) sm

Pretrial 11-21-83

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

42:USC:1983 & 1988;
28:USC:1331(A) & 1343;
28:USC:2201 & 29:USC:1132 — Deprivation of Federal rights, impairment of contr violation of Equal Protection. Pltfs allege defts are attempting to force plt Accident Fund to comply with Attorney General Opinion 5147 which pltfs feel will constitute unlawful confiscation of assets and monies held in trust.

ATTORNEYS

FOSTER, SWIFT, COLLINS, & COEY
By: Theodore W. Swift
David C. Coey
Frank J. Nerat, Jr.
313 South Washington Square
Lansing, MI 48933
517-372-8050

#3: FRANK J. KELLEY
Attorney General
By: Harry G. Iwasko, Jr.
Assistant Atty General
#58: ~~Louis J. Porter~~
~~*Assistant Atty General*~~
704 Law Building
525 W. Ottawa Street
Lansing, MI 48913
517-373-1160
#58: By: Philip J. Smith
Assistant Atty General
#88: By: Robert Ianni
Assistant Atty General

DATE	PROCEEDINGS
1981	
May 1,	Filed Complaint for Injunctive and Declaratory Relief w/attached exhibits A & B
May 1,	Summons issued and returned to pltf's representative
May 7,	Summons returned from pltf's attorney and delivered to Marshal for svc
May 15,	Filed Marshal return showing service on Nancy A. Baerwaldt via Caroline Smalley, Special Dep. Comm., on 5-13-81; showing service on William S. Ballenger via Linda Laws, Exect. Secty., on 5-13-81; showing service on Richard A. Ross via Diane McIntyre, secretary, on 5-13-81
June 3,	Filed ANSWER
1982	
Jan. 8,	Filed ORDER SCHEDULING EVENTS; attorneys to meet by 1-29-82; discovery 6-7-82; pretrial 8-13-82 at 3:30 p.m.; bench trial 10-4-82 — cert copies sent to Attys Coey & Iwasko
Feb. 10,	Filed Joint Report of Conference held by attorneys w/attached proof of svc
Mar. 22,	Filed defts' MOTION for Summary Judgment w/ attached Brief in Support, Exhibits 1 thru 16 & proof of svc
Apr. 1,	Filed pltf's Notice of Taking Deposition of Nancy A. Baerwaldt on 4-13-82 at 1:00 a.m. in Lansing, MI w/attached proof of svc
Apr. 20,	Filed pltfs' Reply to defts' Motion for Summary Judgment
Apr. 20,	Filed pltfs' Brief in Opposition to defts' Motion for Summary Judgment (Oral Argument Requested) w/attachments
Apr. 20,	Filed proof of svc for pldgs 8 & 9

District Court Docket Sheets

DATE	PROCEEDINGS
1982	
Apr. 23,	Filed letter from Atty Nerat advising of mistakes found in pltfs' Reply to defts' Motion for Summary Judgment, etc. (see #8 & #9)
June 17,	Filed letter from atty Nerat advising that discovery report will be late as atty Porter is on vacation and not available to discuss contents of report
June 30,	Filed Stipulation for Extension of Time for Completion of Discovery and for Filing of Discovery Report
June 30,	Filed ORDER denying request to extend discovery; all motions to be filed w/in 15 days following completion of discovery; pretrial scheduled for 8-13-82; trial scheduled for 10-4-82 — copies mailed to attys Nerat & Porter
July 1,	Filed Court's notice that pretrial will be held in Grand Rapids before Judge Gibson on 8-13-82 at 3:30 p.m. — copies mailed
July 9,	Filed ORDER RE: Discovery Report: pltfs shall have appropriate sanctions enforced against them unless report required by Order Scheduling Events is filed w/in 5 days; copy mailed to attys Swift and Iwasko
July 12,	Filed pltfs' Discovery Report w/attached proof of svc
Aug. 9,	Filed Pltfs' MOTION for Order Compelling Discovery
Aug. 9,	Filed Pltfs' Brief in Support of motion for order compelling discover
Aug. 9,	Filed Proof of Service for pldgs #18 and 19
Aug. 13,	Filed Notice of Pretrial rescheduled from 8-13-82 to 8-24-82 at 3:30 p.m. in Kalamazoo, MI; pretrial order due 8-20-82; copies mailed by A.M.

District Court Docket Sheets

DATE	PROCEEDINGS
1982	
Aug. 19,	Filed OPINION
Aug. 19,	Filed ORDER that defts' Motion for Summary Judgment is denied in part and granted in part in accordance w/opinion — copies mailed to atty Swift & Iwasko
Aug. 23,	Filed ORDER that parties meet w/in 10 days to resolve matters in re Motion for Production of Documents; also pltfs' counsel is to file affidavit stating why Motion was not filed earlier — copies mailed to attys Nerat & Iwasko
Aug. 31,	Filed Affidavit of Frank J. Nerat, Jr. required by 8-20-82 Order Compelling Meeting w/proof of svc
Sept. 1,	Filed Notice of Bench Trial Term; 10-4-82 thru 10-29-82; this case #6 — copies mailed to attys Nerat & Porter
Sept. 3,	Filed letter from Nerat in answer to Court's Order compelling meeting (see pldg 24)
Sept. 15,	Filed deft's MOTION for Summary Judgment as to Termination of Separate Pension Plan w/affidavit of John Hueni, brief in support and attachments
Sept. 16,	Filed First Amended PROPOSED JOINT PRETRIAL ORDER
Sept. 17,	Filed proof of service for pldg 28
Sept. 21,	Filed ORDER that Silveria O. Kanoyton and John Heueni are substituting as party defts in place of deft William A. Ballenger and deft Richard A. Ross; and that Loren Monroe, Gerald Miller and the Michigan Civil Service Commission are added as party defts; and further ORDERED that *pltf need not serve said defts* and that original *answer stands for all defts*

District Court Docket Sheets

DATE	PROCEEDINGS
1982	
Sept. 24,	Filed transcript of Pretrial — Motions, Schedule held 9-15-82 in Kalamazoo; Jarratt Martin, Court Reporter
Sept. 29,	Filed letter from atty Porter giving correct spellings of Silveren and Hueni
Oct. 6,	Filed pltfs' MOTION to reconsider, alter or amend Opinion and Order of 8-19-82
Oct. 6,	Filed pltfs' brief in support of above motion
Oct. 6,	Filed affidavit in support of Motion for Rehearing w/attachment
Oct. 6,	Filed pltfs' Reply to defts' Motion for Summary Judgment as to termination of separate pension plan
Oct. 6,	Filed pltfs' Brief in opposition to Motion for Summary Judgment as to termination of separate pension plan w/attached exhibit A
Oct. 6,	Filed proof of service for pldgs 35 thru 39
Oct. 7,	Filed defts' Respons to Motion for Order compelling discovery w/proof of svc
Oct. 7,	Filed defts' Amended MOTION for Summary Judgment as to termination of separate pension plan w/brief in support and proof of svc
Oct. 25,	Filed pltfs BRIEF in opposition to amended MOTION for summary judgement as to termination of separate pension plan w/proof of service attached.
Oct. 25,	Filed pltfs BRIEF in opposition to rehearing amendment or alteration of opinion of August 19, 1982; w/proof of service attached.
Oct. 25,	Filed EXHIBITS to BREIF in opposition to rehearing amendment or alteration of opinion of August 19, 1982.

District Court Docket Sheets

DATE	PROCEEDINGS
1982	
Nov. 2,	Filed Notice of Bench Trial Term from 12-14-82 through 12-27-82; this case is #2, copies sent to Attys Nerat & Porter
Nov. 4,	Filed letter from atty Swift confirming telephone message that oral argument scheduled for 11-3-82 has been adjourned to 11-8-82 at 2:30 p.m. and comments regarding brief filed on 10-25-82 by deft.
Nov. 9,	Filed letter from Asst. Atty Gen. Porter in response to Atty Swift letter of 11-3-82
Nov. 16,	Hearing Motion for Reconsideration — granted
Nov. 23,	Filed Transcript of Hearing of Reconsideration & Summary Judgment; CSR—Jarratt Martin (on 11-16-82)
Dec. 23,	Filed the Court's certificate of Questions to the Michigan Supreme Court; counsel must prepare briefs or request oral argument w/in 30 days at which time the Court will forward the certificate to The Mich. Supreme Ct — copies sent to attys Swift & Iwasko
Dec. 23,	Filed deft's letter representing questions to be certified to the Mich. Supreme Ct. per hearing on 11-16-82 w/proof of service
Dec. 23,	Filed pltf's letter representing questions to be certified to the Mich Supreme Ct. per hearing on 11-16-82
Dec. 29,	Filed ORDER that the parties shall have 15 days from the termination of the 30 day period to file responsive brief in this matter — copies sent to Attys Swift & Iwasko

District Court Docket Sheets

DATE	PROCEEDINGS
1983	
Jan. 14,	Filed deposition of Nancy A. Baerwaldt taken 4-13-82 in Lansing, MI; Reneé L. Cowdrey, CSR & Notary Public
Jan. 17,	Filed copy of letter from atty Swift to atty Porter confirming plans for exchanging of briefs
Jan. 25,	Filed defts' Brief regarding questions certified by U.S. District Court for Western District of MI
Jan. 25,	Filed proof of service for above brief
Feb. 8,	Sent pldg #50 (original) to the MI Supreme Ct. w/copy of Opinion & order of 8-19-82 as Exhibit A.
Feb. 7,	Filed Substitution and Appearance of Philip J. Smith in the Stead of Louis J. Porter on behalf of defts w/proof of svc
Feb. 11,	Filed copy of pltfs' Responsive Brief on questions certified by the U.S. District Court for W/ MI
Mar. 23,	Filed response from MI Supreme Court acknowledging receipt & consideration of the certified questions presented to its court; the Court declines to respond to the questions
Aug. 11,	Filed pltf's MOTION for an Order enforcing agreement on the record or alternatively for Preliminary Injunction & Brief in support
Aug. 11,	Filed Affidavit of Floyd W. Luginbill in support of above Motion
Aug. 11,	Filed Notice of Hearing of above Motion on 8/16/83 at 3 30 pm
Aug. 11,	Filed proof of service of pldgs 61 thru 63 upon atty Smith — Asst Atty Genl

District Court Docket Sheets

DATE	PROCEEDINGS
1983	
Aug. 16,	Filed deft's Response to Motion for an order enforcing agreement on the record or alternatively for preliminary injunction & Brief in support of said response w/affidavit of Nancy A. Baerwaldt & Philip J. Smith w/exhibit 1
Aug. 16,	Filed proof of service of above pldg
Aug. 17,	Filed SUPPLEMENTAL ORDER SCHEDULING EVENTS: discovery is reopened until 9/16/83 w/discovery report due w/in 10 days after; no motion shall be filed later than 9/21/83; pretrial set for 11/17/83 at 2:30 pm; bench trial set for 1/2/84 — copies sent to attys Swift and Smith
Aug. 26,	Filed pltfs' First interrogatories to defts
Aug. 26,	Filed pltfs' request for production of documents
Aug. 26,	Filed proof of service of pldgs 68 & 69 upon atty Iwasko
Aug. 30,	Filed pltf's Request for admissions of fact w/ proof of service
Aug. 30,	Filed defts' first request to pltf for production of documents
Sep. 26,	Filed transcript of Ruling on Motion for Preliminary Injunction, etc. held 8-16-83 in Kalamazoo; Jarratt Martin, RPR-CM
Sep. 23,	Filed defts' MOTION for Summary Judgment w/ attached brief in support exhibits 1 thru 34 and proof of svc
Sep. 29,	Filed letter from atty Nerat representing Discovery Report
Sep. 30,	Filed pltfs' Response to defts' First Request for Production of Documents w/proof of svc
Oct. 3,	Filed defts' Answer to first interrogatories and to pltfs' request for production of documents

District Court Docket Sheets

DATE	PROCEEDINGS
1983	
Oct. 3,	Filed defts' Response to request for admission of fact
Oct. 3,	Filed proof of service for pldgs 77 & 78
Oct. 4,	Filed pltfs' Reply to defts' motion for summary judgment
Oct. 4,	Filed pltfs' Brief in opposition to defts' motion for summary judgment
Oct. 4,	Filed proof of service for pldgs 80 & 81
Oct. 6,	Filed pltfs' Notice of Taking Deposition of Thomas E. Pierson on 10-7-83 at 2:00 p.m. in Lansing, MI w/proof of svc
Oct. 6,	Filed pltfs' MOTION for Preliminary Injunction w/exhibits A thru G
Oct. 6,	Filed Brief in support of above motion
Oct. 6,	Filed notice of hearing above motion
Oct. 6,	Filed proof of service for pldgs 84 thru 86
Oct. 11,	Filed defts' MOTION to Dismiss pltf Michigan State Accident Fund
Oct. 11,	Filed brief in support of above motion
Oct. 11,	Filed notice of hearing above motion
Oct. 11,	Filed proof of service for pldgs 88 thru 90
Oct. 14,	Filed defts' Reply to pltfs' Motion for Preliminary Injunction w/exhibit A
Oct. 14,	Filed Brief in Opposition to pltfs' motion for preliminary injunction
Oct. 14,	Filed proof of service for above reply and brief
Oct. 14,	Filed pltfs' Memorandum Brief in opposition to motion to dismiss pltf w/proof of svc
Oct. 14,	Filed deposition of Thomas E. Pierson taken 10-7-83 in Lansing, MI Joan Farhat Byrnes, CSR & Notary Public

District Court Docket Sheets

DATE	PROCEEDINGS
1983	
Oct. 14,	Filed continued deposition of Thomas E. Pierson taken 10-11-83 in Lansing, MI; Christine Krystyniak, CSR & Notary Public w/exhibit
Oct. 14,	Hearing on Preliminary Injunction — taken under advisement; Swift law firm shall be allowed to have access to fund employees and documents in order to prepare for trial
Oct. 18,	Filed defts' Supplemental Answer to First Interrogatories to defts and pltfs' request for production of documents w/proof of svc
Oct. 27,	Filed Transcript of Arguments of Counsel and Directives of the Court held 10-14-83 in Kalamazoo, MI; Jarratt W. Martin, RPR-CM
Nov. 1,	Filed letter from Nancy A. Baerwaldt, Commissioner of Insurance, informing of steps taken regarding operations of State Accident Fund
Nov. 15,	Filed OPINION and ORDER that defts' Motion for Summary Judgment filed 9-21-83 is denied; that defts' Motion for Summary Judgment as to Termination of Separate Pension Plan is denied; and that defts' Motion to Dismiss pltf Michigan State Accident Fund is denied — copies mailed to attys Swift and Ianni
Nov. 16,	Filed letter from atty Swift confirming that pretrial conference scheduled for 11-17-83 is rescheduled for 11-21-83 at 3:30 p.m.
Nov. 21,	Filed PRETRIAL ORDER (Second Amended)
Nov. 21,	Pretrial; Court ruled Accident Fund money is a trust fund and that beneficiaries are employee-insureds and their employees; attys to meet before 12-2-83 to resolve by stipulation issues of fact and of law; pretrial hearing scheduled for

District Court Docket Sheets

PROCEEDINGS

12-2-83 at 2:30 p.m.; pending motion to compel resolved when defts produce documents in dispute; findings of fact, conclusions of law and legal memoranda to be filed by 1-2-84; court orders that it is not necessary to replead to reflect changes in personnel as named parties

District Court Docket Sheets

DATE	PROCEEDINGS
1983	
Nov. 30,	Filed Notice of Bench Trial Term 1-3-84 thru 2-3-84; this case is #1 for week of 1-9-84 — copies mailed to attys Swift & Ianni
Nov. 30,	Filed deposition of Roy Francis Murry taken 11-1-83 in Lansing, MI w/exhibits; Kathryn M. Taylor, CSR & Notary Public
Dec. 2,	Filed Transcript of Pretrial Conference held 11-21-83 in Kalamazoo, MI; Jarratt W. Martin, RPR-CM
Dec. 19,	Filed Proposed Second Joint Pretrial Order
Dec. 20,	Filed Stipluation regarding the deprivation of property without due process and confiscation of property without just compensation claims of pltfs Accident Fund, Elston-Richards Storage and Russell Jameson
Dec. 23,	Filed transcript of Order of Court held 12-14-83 in Kalamazoo, MI; Jarratt W. Martin Court Reporter
Dec. 29,	Filed deposition of Ralph Joseph Gerson taken 11-2-83 in Lansing, MI w/exhibits; Kathryn M. Taylor, CSR & Notary Public
1984	
Jan. 3,	Filed deposition of Duane Marlan taken 12-28-83 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 3,	Filed deposition of Haywood Julian taken 12-28-83 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 3,	Filed deposition of Herbert DeJonge taken 12-28-83 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 3,	Filed deposition of Paula Mitchell taken 12-28-83 in Lansing, MI; Connie S. Coon, CSR & Notary Public

District Court Docket Sheets

DATE	PROCEEDINGS
1984	
Jan. 3,	Filed deposition of Joseph Slivensky taken 12-28-83 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 3,	Filed deposition of Martha Bibbs taken 12 29-83 in Lansing, MI; Connie S. Coon, CSR & Notary Public w/exhibits
Jan. 5,	Filed defts' Request for Immediate Consideration for Motion to Quash Subpoena
Jan. 5,	Filed proof of service for above pleading
Jan. 6,	Filed defts' Trial Brief w/attached exhibits A thru R
Jan. 6,	Filed defts' Proposed Conclusions of Fact and Law
Jan. 6,	Filed proof of service for above two pleadings
Jan. 6	Filed pltfs' Proposed Conclusions of Law
Jan. 6,	Filed pltfs' Proposed Findings of Fact
Jan. 6,	Filed pltfs' Memorandum on Contentions of Fact and Law
Jan. 6,	Filed proof of service for above three pleadings
Jan. 6,	Filed deposition of Haywood Julian taken 1-4-84 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 6,	Filed deposition of Stanley Steinborn taken 1-4-84 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 6,	Filed deposition of John Hueni, Jr. taken 1-3-84 in Lansing, MI; Connie S. Coon, CSR & Notary Public
Jan. 9,	File defts' Supplemental Case to Trial Brief w/ proof of svc
Jan. 9	Filed defts' Brief in Opposition to Application of the Abstention Doctrine w/proof of svc

DATE	PROCEEDINGS
1984	
Jan. 9	Filed letter from atty Swift re guidelines of Accident Fund to communicate w/its member-insureds and Advisory Board members w/ attachments
Jan. 9	Filed pltfs' Memorandum of Law in Support of Jurisdiction of the Court
Jan. 9,	Bench Trial commenced (1); Court signed Consent Judgment resolving deprivation of property without due process and confiscation of property without just compensation claims of pltfs Accident Fund, Elston-Richards Storage Co. and Russell Jameson; Court rules that remainder of case dismissed on grounds of abstention; Court will enter Judgment Order
Jan. 9,	Filed CONSENT JUDGMENT — copies mailed to attys Swift & Iwasko
Jan. 10,	Filed Stipulation of Third Set of Uncontested Material Facts w/attached exhibits A thru K
Jan. 17,	Filed defts' Brief in Opposition to pltfs' Motion for Preliminary Injunction
Jan. 17,	Filed pltf's Brief in Support of Injunction Pending Appeal w/notice of hearing and proof of service
Jan. 20,	Filed Transcript of Ruling of the Court held 1-9-84 in Kalamazoo, Jarratt W. Martin, RPR-CM
Jan. 24,	Filed proof of service for pldg #135
Jan. 24,	Filed letter from atty Smith enclosing copy of opinion in *Citizens Insurance Company of America, et al* v *Nancy A. Baerwaldt, Commissioner of Insurance* (Judge Latreille, Livingston Circuit No. 83-7049-CZ)
Jan. 24,	Filed JUDGMENT ORDER that Court in the exercise of its discretion under the doctrine of

DATE	PROCEEDINGS
1984	
	Railroad Commission v *Pullman Company*, 312 USC 496 (1941), ABSTAINS from consideration of this action; that Court in the exercise of its discretion under the doctrine of *Burford* v *Sun Oil Company*, 319 USC 315 (1943), ABSTAINS from consideration of this action; and that because the Court abstain under Pullman and Burford doctrines this case is DISMISSED — copies mailed to attys Swift/Nerat & Iwasko
Jan. 24,	Filed OPINION on pltfs' Motion for Injunction Pending Appeal
Jan. 24,	Filed ORDER in accordance w/opinion that pltfs' Motion for Injunct Pending Appeal is denied — copies mailed to attys Swift/Nerat & Iwasko (distribution copies made)
Jan. 26,	Filed letter from atty Nerat requesting that opinion attached to letter from atty Smith be stricken from the record of this cause (see #139)
Feb. 2,	Filed OPINION on Abstention — copies mailed to attys Swift & Iwasko
Feb. 22,	Filed deposition of Ralph Joseph Gerson taken 11-23-83 in Lansing, MI
Feb. 22,	Filed Pltfs' NOTICE OF APPEAL from judgment entered 1-24-84
Feb. 27,	Copy of notice of appeal mailed to atty Ianni; copy given to judge and court reporter
Feb. 27,	All information mailed to CCA
Mar. 29,	Filed Pltf's MOTION for Attorney Fees Pursuant to 42:1988 with attachments
Mar. 29,	Filed Pltf's Memorandum Brief in Support of Motion for Attorney's Fees
Mar. 29,	Filed Pltf's Notice of Hearing motion for attorney fees at a time and date to be set by the court

District Court Docket Sheets

DATE	PROCEEDINGS
1984	
Mar. 29,	Filed Proof of service for pldgs #147 thru 149
Mar. 30,	Filed transmission form showing notice of appeal filed 3-1-84 and assigned CCA no. 84-1130
Apr. 9,	Filed defts' response to motion for attys' fees and MOTION for order finding pltfs in contempt of court w/affidavits
Apr. 9,	Filed memorandum brief in opposition to pltfs' motion for attys' fees and in support of motion that pltfs & their attorneys be held in contempt of court
Apr. 9,	Filed proof of service for pldgs #152 & 153
Apr. 23,	Filed letter from State Atty Iwasko w/attached letter from Russell Jameson of Mich State Accident Fund and newspaper clipping
Apr. 30,	Filed pltfs reply to motion for order finding pltfs in contempt of court, affirmative matters and demand for trial by jury
May 1,	Filed letter to the Court from Frank J. Nerat, Jr., atty for pltfs
Aug. 16,	Record on appeal mailed to CCA
Aug. 20,	Filed notice of taking deposition of Nancy Baerwaldt & Gordon H. Lindsay on 9-25-84 w/proof of service
Aug. 20,	Filed notice of taking deposition of Louis J. Porter on 9-11-84 w/proof of service
Aug. 29,	Filed transmission form showing record on appeal filed 8-24-84
Sept. 17,	Filed deposition of Louis J. Porter taken Sept. 11, 1984 before Glenda Trexler, CSR & Notary Public, at Lansing, MI

DATE	PROCEEDINGS
1984	
Sept. 24,	Filed Re-notice of taking depositions of Nancy Baerwaldt and Gordon H. Lindsay on Oct. 2, 1984, beginning at 9:00 a.m. and 2:00 p.m. w/ proof of service
Oct. 12,	Filed Notice scheduling hearing on motion for order of contempt on Nov. 14, 1984 at 2:30 p.m. in Kalamazoo, MI; copies sent by A
Oct. 29,	Filed deposition of Gordon H. Lindsay taken 10-2-84 in Lansing by Christine Krystyniak CSR
Oct. 29,	Filed deposition of Nancy A. Baerwaldt taken 10-2-84 in Lansing by Christine Krystyniak CSR
Nov. 14,	Filed pltf's MOTION seeking leave to conduct an evidentiary hearing in which the representative attorney is also scheduled to appear as a witness w/brief in support, notice of hearing and proof of service
Nov. 14,	Hearing on defts' motion to hold pltfs and pltfs' attorneys in contempt: DENIED
Nov. 19,	Filed ORDER in accordance with opinion rendered orally 11-14-84 that defts' motion to hold pltfs and pltfs' attorneys in contempt is DENIED, and pltfs' motion for attorney fees is held in abeyance pending decision by the Sixth Circuit on pltfs' appeal of this Court's opinion abstaining from further proceedings in this action; copies mailed to Attys Swift & Iwasko

Supreme Court, U.S.
FILED
NOV 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-626

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, § 1, 1915 CL 5477, et al

Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, et al

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT BRIEF IN OPPOSITION

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Harry G. Iwasko, Jr.
Assistant Attorney General

Attorneys for Respondents

740 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1160

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1985

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE THE FEDERAL COURT ABSTAINED FROM DECIDING THIS CAUSE BASED UPON THE DOCTRINE SET FORTH IN RAILROAD COMMISSION v. PULLMAN CO, DID THE COURT ERR IN DISMISSING CLAIMS OF PARTIES WHO WERE NOT PETITIONERS?

II.

IS ABSTENTION UNDER THE PRINCIPLES SET FORTH IN RAILROAD COMMISSION v. PULLMAN CO APPROPRIATE WHERE THE STATE SUPREME COURT HAS REFUSED TO ADDRESS STATE LAW QUESTIONS INVOLVING A DETERMINATION OF DISPUTED FACTS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

INDEX OF AUTHORITIES iii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DIRECTED THE DISTRICT COURT TO ONLY RETAIN JURISDICTION OF CLAIMS OF THE REMAINING PETITIONERS 10

II. ABSTENTION UNDER THE *BURFORD* DOCTRINE AS WELL AS THE *PULLMAN* DOCTRINE IS APPROPRIATE 14

A. Pullman Doctrine 14

B. Burford Abstention 17

RELIEF REQUESTED 20

INDEX OF AUTHORITIES

Cases Page

Burford v. *Sun Oil Co.*, 319 U.S. 315; 63 S.Ct. 1098; 87 L.Ed. 1424 (1943) 12, 13, 17, 19

Colorado River Water Conservation District v. *United States*, 424 U.S. 800; 96 S.Ct. 1236; 47 L.Ed. 2d. 483 (1976) 18

Louisiana Power & Light Co. v. *City of Thibodaux*, 360 U.S. 25; 79 S.Ct. 1070; 3 L.Ed.2d 1058 (1958) 18

Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89; 104 S.Ct. 900; 79 L.Ed.2d 67 (1984)..... 12

Railroad Commission v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed. 971 (1941) 12, 13, 14, 17, 19

Sailors v. *Board of Education of the County of Kent*, 387 U.S. 105, 109 (1967) 12

Taylor and Marshall v. *Beckman*, 176 U.S. 548, 573 (1899) 12

WXYZ, Inc. v. *Hand*, 658 F.2d. 420 (6th Cir. 1981)..14, 15, 16

Statutes

1911 P.A. 245, § 2 1

1912 PA 10 (First Extra Session), Part V 2

1917 P.A. 206 3

M.C.L.A. 21.101a; M.S.A. 3.606(1a) 4

M.C.L.A. 38.13; M.S.A. 3.981(13) 3

M.C.L.A. 550.701 *et seq*; M.S.A. 24.571 *et seq* 3

29 U.S.C. § 1001 *et seq* 8

42 U.S.C. § 1983 5

Constitution Page

U.S. Const., Art. 1, § 10 5

Michigan Const 1963, art 11, § 5 v

Opinions

O.A.G. 1975-1976, No. 5147, p. 695 (December 7, 1976) .. 4

Other

Report of the Employers' Liability and Workmen's Compensation Commission, pp 26, 27 (1911) 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Michigan Const 1963, art 11, § 5, provides:

> "The classified state civil service shall consist of all positions in the state service . . .
>
> • • •
>
> "The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation . . . and regulate all conditions of employment in the classified service."

The Michigan Public Act creating the Michigan State Accident Fund, 1912 PA 10 (First Extra Session), Part V, is set forth at pp 52a-57a of Petitioners' Appendix.

No. 85-626

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, § 1, 1915 CL 5477, et al

Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, et al

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners assert that the Accident Fund was statutorily created to be "a private independent entity." The three officers of the State of Michigan named as Respondents are required by law to administer the statute which created the Accident Fund and to administer the provisions of the Michigan Constitution, which require the Civil Service Commission to classify all positions within the state service.

In 1911, the Michigan legislature established a "Commission of Inquiry" to investigate "the matter of compensation for accidental injuries or death of workmen arising out of and in the course of employment." 1911 P.A. 245, § 2. that commission recommended the establishment of an "accident fund"

under the supervision of the Commissioner of Insurance, saying:

> "It has also been asserted at these hearings that these funds can be collected and disbursed more efficiently through the instrumentalities of the State than in any other manner."
>
> *Report of the Employers' Liability and Workmen's Compensation Commission*, pp 26, 27 (1911).

Following the Commission of Inquiry's report, the State's first workers compensation law was adopted. 1912 P.A. 10 (First Extra Session). Part V of the act created the Accident Fund. (52a-57a)

Section 1 of Part V required the Commissioner of Insurance to assume charge of levying and collecting from employers such premiums and dividends as necessary to pay compensation under the act and the cost of administration if five or more employers employing 3,000 employees request the Commissioner to do so.

Section 2 of the act authorized the creation of a fund in the State Treasury to be known as "accident fund" and required the Commissioner of Insurance to provide a bond.

Section 3 of the act authorized the Commissioner of Insurance to readjust the premuims from time to time, as necessary.

Section 4 of the act required the Commissioner of Insurance to classify employers by risk and determine premiums to be charged each employer.

Section 5 of the act provided that suits to collect premiums "shall be collected by an action at law in the name of the state as plaintiff. . . ."

Section 8 of the act provided that employers who refuse to submit their books for inspection by the Commissioner of Insurance shall become subject to a penalty of $50.00 for each offense "to be collected by civil action in the name of the state and paid into the accident fund. Any individual who shall personally give such refusal shall be guilty of a misdemeanor."

Section 10 of the act provided:

> "Disbursements from said accident fund shall be made only upon warrants approved by the board of state auditors upon vouchers therefore transmitted to it by the commissioner of insurance. . . ."

Five years later, 1917 P.A. 206 created an "advisory board", which was given the statutory authority to fix the compensation of the Commissioner's deputies and assistants, which power had previously been held under the 1912 act by the Board of State Auditors. 1917 P.A. 206 also provided, in Section 12 thereof, that the advisory board members are to be nominated at the annual meeting of employers and certified to the Governor. The nominees "shall receive an appointment as such by the Governor to serve for the term of two years." Section 13 of 1917 P.A. 206 provided:

> "The advisory board shall advise with the Commissioner of Insurance as to the means and methods of administering the affairs of the said accident fund, not inconsistent with the provisions of this act."

The State of Michigan is required to provide workers compensation benefits to its employees through the State Accident Fund, M.C.L.A. 550.701 *et. seq.*; M.S.A. 24.571 *et. seq. The employees of the State Accident Fund are in the state employees retirement system,* M.C.L.A. 38.13; M.S.A. 3.981(13).

The State Accident Fund continues as a fund in the state accounting system, M.C.L.A. 21.101a; M.S.A. 3.606(1a).

On December 7, 1976, Attorney General Frank J. Kelley issued O.A.G. 1975-1976, No. 5147, p. 695 (December 7, 1976), stating at p 698 thereof:

> "Having determined that the State Accident Fund is a state agency, it is clear that the legislature may control the authority and operations of the Fund and may, if it chooses to do so, disband the operation of the Fund completely. Also, employees of the Fund are state employees and, as such, are within the classified State Civil Service, Const 1963, art II, § 5, *DeMaggio* v *Attorney General*, 300 Mich 207; 1 NW2d 530 (1942)."

Following the opinion of the Attorney General, the advisory board of the State Accident Fund attempted to have Senate Bill No. 38 of 1979 enacted, which would allow the State Accident Fund to merge with a domestic mutual insurer. In 1981, the State Accident Fund advisory board attempted to have Senate Bill No. 352 enacted, which would have provided:

> "The Accident Fund is a body corporate, separate and distinct from the state, and may sue and be sued, plead and be inpleaded, contract and be contracted with, and have a corporate seal."

If enacted, this act would have provided: "The business and affairs of the Accident Fund shall be managed by its governing board." Both attempts to amend the State Accident Fund act failed.

On May 1, 1981, a Complaint for Injunctive and Declaratory Relief was filed in the United States District Court for the Western District of Michigan. The Plaintiffs were the Acci-

dent Fund, claiming to be a legal entity, two employees of the Accident Fund, and two policyholder members of the advisory board of the Accident Fund. The Defendants were all officers of the State of Michigan: the Commissioner of Insurance, the Personnel Director of the Civil Service Commission, and the Director of the Department of Licensing & Regulation, which department included the Insurance Bureau.

Plaintiffs' Complaint alleged that the Defendants' actions impaired contracts in violation of U.S. Const., Art. 1, § 10, violated the due process and just compensation clauses of the fifth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment, violated 42 U.S.C. § 1983, and impaired the employees' rights under the Employee Retirement Income Security Act of 1974 ("ERISA").

The relief requested, other than relief requested under ERISA, in the complaint, is:

> "A. Issuance of a . . . injunctive order enjoining . . . the Defendants . . . from treating the Plaintiff Accident Fund as a state agency, subjecting the Plaintiff Accident Fund to the constitutional and statutory restrictions imposed on state agencies, classifying the employees of the Plaintiff Accident Fund as employees of the State of Michigan within the classified civil service of the State of Michigan, taking any and all other action which interferes with or which would interfere with the autonomous, independent and successful operation of Plaintiff Accident Fund, converting the assets of Plaintiff Accident Fund, and any other manner unlawfully interfering in Plaintiff Accident Fund's operations and unlawfully interfering with the rights and benefits enjoyed by Plaintiffs Ellison and Grost as employees of the Accident Fund and Plaintiffs Elston-Richards and Jameson as employers insured by the Accident Fund, . . ."

The Defendants' affirmative defenses included:

"1. *Lack of Jurisdiction over Subject Matter.* In addition to lacking subject matter jurisdiction, Defendants affirmatively state that the plan which is in effect is exempt from the provisions of the Employees Retirement Income Security Act (ERISA). Further, the ERISA allegations are simply a defense to anticipated state action and are cognizable in state court.

"2. *Abstention/Federal Equitable Restraint.* This case raises state constitutional issues which concern the organization of the executive branch of state government and the applicability of the state constitution's civil service provisions to certain employees of the Insurance Commissioner.

"3. *Lack of Any Actual Controversy under State or Federal Law Regarding Pension Plan.* The state officials have only come to tentative conclusions as to how the pension plans would be handled. No state officer has taken a final position as to this issue.

• • •

"6. *No deprivation has Occurred or is Imminently Threatened.* Const 1963, art 9, § 24 provides:

" 'The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.'

"If the pension plan is authorized by law and not in violation of state constitution or statute, the state officers fully intend to abide by the foregoing provision."

On March 18, 1982, Defendants filed a Motion for Summary Judgment contending that there was no genuine issue as to any material fact and that the sole legal question presented was whether the Accident Fund is an agency or instrumentality of the State of Michigan.

On August 19, 1982, the federal district court issued its Opinion granting Defendants' Motion for Summary Judgment in part and denying it in part. The federal district court Opinion held that the Accident Fund was a state agency since its creation and its employees were therefore state employees. The court also concluded that the state did not create the second pension plan in question and therefore the state has no obligation to contribute to its maintenance as the Plaintiffs must look to the employers-insureds for such contributions. The summary judgment was subsequently set aside on Plaintiffs' Motion for Rehearing alleging that a factual hearing was necessary in order to determine whether the legislature actually intended the creation of a state agency or instrumentality. The trial was scheduled for January 9, 1984.

On January 9, 1984, the federal district court issued its oral opinion on abstention on its own motion. The Defendants argued against abstention for the reason that nearly three years had elapsed since the filing of the original complaint and more than seven years since the Attorney General's opinion. Whether the Accident Fund was a state agency had to be decided.

Defendants, in their conclusion to the brief opposing abstention, stated:

> "However, if this court presumes that the Sixth Circuit Court of appeals will eventually remand and dismiss for failure of this court to abstain, then it is better that abstention occur now so that the parties may proceed to the state forum without further delay."

On January 9, 1984, Judge Enslen, prior to issuing his decision to abstain, entered a Consent Judgment. Despite the language of the Consent Judgment, Defendants argued unsuccessfully that the court did not have jurisdiction and that the Plaintiffs were not the prevailing party. On January 24, 1984, the court denied Plaintiffs' motion for injunction pending appeal. On February 2, 1984, the court issued its written opinion on abstention.

On June 22, 1984, the Michigan Civil Service Commission classified the employees assigned to the State Accident Fund into the State Civil Service. The advisory board of the State Accident Fund, Plaintiffs Ward Ellison and Max Grost filed a Petition for Review of the Michigan Civil Service Commission's action of June 22, 1984 with the Ingham County Circuit Court on August 19, 1984. The Petition included within its charges that the implementation plan constituted an unlawful and unconstitutional impairment of the rights of contract existing between the State Accident Fund and its employees. Specifically, the Petition charged that the proposed implementation plan provides that employer funding of a separate pension plan for State Accident Fund employees is to be discontinued and constituted an impairment of contract. The Petition further claimed that the separate pension plan established and maintained for State Accident Fund employees was protected by the provisions of ERISA. 29 U.S.C. & 1001 *et. seq.*

On July 20, 1984, the Defendants in this suit filed a Complaint in the Ingham County Circuit Court against the advisory board of the Michigan State Accident Fund and its individual members, the purported manager of the State Accident Fund, and the purported attorney and agent for the advisory board. The State's Motion for Summary Judgment was granted in part and denied in part by the Opinion of the Ingham County Circuit Court, dated May 14, 1985, as set

forth in its entirety in the attached Appendix. Both the June 22, 1984 action brought by the advisory board of the State Accident Fund and the State's action of July 20, 1984 are before Ingham County Circuit Court Judge Carolyn Stell.

Ingham County Circuit Court Judge Carolyn Stell's Opinion held that she could not grant a summary judgment as to the question whether the Accident Fund was a state agency without a trial to determine legislative intent.

On June 26, 1985, the Sixth Circuit Court of Appeals issued its Opinion affirming the District Court judgment to abstain with instructions for the District Court to retain jurisdiction over the Petitioners' ERISA claims. The Court had noted in footnote 1 (3a):

> "The claims of plaintiffs Elston-Richards Storage Company and Russell Jameson, employers who have memberships on the Advisory Board to the Fund and workmen's compensation policies insured by the Fund, were resolved by stipulation and a consent judgment entered by the district court on January 9, 1984. Thus, Elston-Richards Storage Company and Russell Jameson are not parties to this appeal."

The District Court had previously noted, in its Opinion of January 24, 1984, in footnote 2 (42a):

> "The Complaint was brought by the Accident Fund, named employees, and named member-insureds. By Consent Judgment filed January 9, 1984, the due process and just compensation claims of the Fund, Elston-Richards Storage Company, and Russell Jameson, only, have been resolved. All other constitutional claims remain."

REASONS FOR DENYING THE WRIT

I

THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DIRECTED THE DISTRICT COURT TO ONLY RETAIN JURISDICTION OF CLAIMS OF THE REMAINING PETITIONERS

This case involves an action brought against the three officers of the State of Michigan required by law to administer the statute which created the Accident Fund and the provisions of the Michigan Constitution which require the Civil Service Commission to classify all positions within the State service. The decision in this case would have a direct effect upon the State of Michigan by affecting the operation of the executive branch of government of the State and curtail the ability of the State to provide workers compensation insurance through the Accident Fund.

A reading of Petitioners' complaint leads to the ineluctable conclusion that all of Petitioners' claimed rights and therefore violations thereof arose out of the State statute which created the Accident Fund. The only remaining Petitioners in this appeal are the two employees of the Accident Fund, whose argument is that the State officer Respondents are violating State law in their attempts to assert that the Accident Fund is an agency of the State of Michigan or instrumentality of the state, and that the employees of the Accident Fund are employees of the State of Michigan. These remaining Petitioners seek relief as purported employees of a statutorily created "private independent entity" from the federal courts, despite the fact that the "private independent entity" has never filed any federal tax returns nor has it ever filed any forms required under ERISA.

The Sixth Circuit Court of Appeals affirmed the District Court judgment to abstain with instructions for the District Court to retain jurisdiction over the plaintiffs' ERISA claims. (7a) In doing so, the Sixth Circuit Court of Appeals concluded that the District Court should retain jurisdiction over only those matters which still remained undecided in the District Court. As noted in the Statement of the Case, both courts set forth in footnotes to their Opinions that claims of other parties were resolved by stipulation and a consent judgment. (3a and 42a)

The Petitioners had not alleged that the State statute which created the Accident Fund was unconstitutional. The allegation was merely that the State officer Respondents were attempting to enforce and interpret the State statute in a manner that violated ERISA. Moreover, Petitioners allege that their interpretation of the statute is correct because they have been enforcing the statute in the absence of enforcement by the State officer (Insurance Commissioner) named in the statute. Both the District Court and the Court of Appeals recognized that all of Petitioners' claims arose out of state law. Even the supplemental pension plan, which was established for the employees of the Accident Fund, arose out of the claim that the Advisory Board's power to fix compensation of employees included the power to establish a second pension fund for these employees in addition to the pension they receive as members of the State Employees Retirement System. Thus, the threshold question and the sole question with respect to all of Petitioners' claims is whether the Accident Fund is a State agency or instrumentality of the State, thus subjecting its employees to the civil service provisions of the state constitution.

Since, historically, the constitutional organization of the executive branch of State government, and the interpretation of State constitutions are not questions properly cognizable

by federal courts, the Sixth Circuit Court of Appeals determined it was proper to abstain from consideration of these questions. *Taylor and Marshall* v. *Beckman*, 178 U.S. 548; 20 S.Ct. 890; 44 L.Ed. 1187 (1899); *Sailors* v. *Board of Education of the County of Kent*, 387 U.S. 105; 87 S.Ct. 1549; 18 L.Ed.2d 650 (1967).

The Sixth Circuit Court of Appeals did not affirm or deny the District Court's exercise of its discretionary power to abstain on both *Pullman* and *Burford* grounds. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed. 971 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315; 63 S.Ct. 1098; 87 L.Ed. 1424 (1943). It should not be inferred that the Sixth Circuit Court of Appeals did not find *Burford* to be a valid basis for abstention. Rather, it should be inferred that the court did not find it necessary to abstain on both grounds because it was directing the District Court to retain jurisdiction as to the only claims in which the remaining Petitioners were involved. Those claims were solely as to ERISA. It was because the District Court abstained on both *Pullman* and *Burford* grounds that it dismissed the cause of action. The District Court noted in footnote 8 (51a) that the United States Supreme Court had recently issued its decision in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89; 104 S.Ct. 900; 79 L.Ed.2d 67 (1984). The District Court was encouraged that that decision ". . . may lend support, at least in spirit, to my decision to abstain, and in fact may raise questions as to this Court's jurisdiction to consider this case. . . ." The District Court further noted:

> ". . . Since the instant action involves, in effect, allegations that state officials have not complied with state law (as it has been construed for many years), my decision to abstain would appear to parallel the *Pennhurst* majority reasoning."

It was because the District Court considered an abstention under *Burford* appropriate and it was because of its recognition that what was involved in this suit were "allegations that state officials have not complied with state law", that this was a matter left entirely for the state courts. The Sixth Circuit Court of Appeals did not conclude that the Eleventh Amendment to the Constitution of the United States entirely denied jurisdiction to the District Court, but it did recognize that the District Court was not the forum where the necessary determination of whether the Accident Fund was a State agency should be resolved.

The Sixth Circuit Court of Appeals did not choose to dismiss the entire suit. It retained that portion that involved the remaining Petitioners. As it had noted earlier, the only Petitioners who remained were the two employees asserting the ERISA defense. No purpose would be served to retain jurisdiction of the other purported causes of action. While the Sixth Circuit Court of Appeals did not render an opinion as to the appropriateness of the abstention under *Burford*, it also did not overrule the District Court as to the District Court's decision to abstain under both *Burford* and *Pullman*. It is the position of the Respondents that the District Court was correct in abstaining under both *Pullman* and *Burford* for the reasons set forth in Argument II. The Sixth Circuit Court of Appeals did not state it affirmed in part and overruled in part. Its Opinion simply states that it affirms the District Court as to *Pullman*. It is fair to infer that the *Burford* abstention would have been affirmed as well if the Sixth Circuit Court of Appeals had considered dismissing the entire cause. Both the District Court and the Sixth Circuit Court of Appeals exercised discretionary powers in deciding to abstain. The Sixth Circuit Court of Appeals' silence should not be inferred to be disagreement, but only a recognition that this cause was so manifestly a matter which should be considered by the state courts that it found it unnecessary to discuss both doctrines.

II

ABSTENTION UNDER THE BURFORD DOCTRINE AS WELL AS THE PULLMAN DOCTRINE IS APPROPRIATE

A. Pullman Doctrine.

The federal district court, in its abstention opinion (44a-45a), notes:

> ". . . Although Plaintiffs have phrased much of their cause of action in federal constitutional terms, the threshhold question is whether the Accident Fund is a state agency or instrumentality; a question of state law interpretation. State law on this issue, *as Plaintiffs freely admit, is ambiguous*. Furthermore, since the propriety, and thus the constitutionality, of the directives issued by the Insurance Commissioner depends upon a determination as to the state agency or instrumentality status of the fund, the requisite federal constitutional claims which might be mooted or presented in a different posture by a state court determination of pertinent state law are present. . . ." (Emphasis added.)

Manifestly, the federal district court was correct in its observation. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed. 971 (1941), is clearly applicable to the case at hand. Petitioners assert, citing *WXYZ, Inc.* v. *Hand*, 658 F.2d. 420 (6th Cir. 1981), that because the Michigan Supreme Court refused to accept the certified questions from the federal district court and issue an opinion thereon, the *Pullman* abstention cannot apply. True, in *WXYZ, supra*, the Sixth Circuit Court of Appeals did state that one of the reasons it would not grant *Pullman* abstention was the failure of the Michigan Supreme Court to respond to the certified

questions. However, the questions that were certified to the Michigan Supreme Court in this case required an enormous appendix, 826 pages in length, and as the district court noted, Petitioners admitted there was ambiguity as to the laws. Moreover, the action of the district court in dissolving the summary judgment awarded to Respondents, and deciding to hold a trial at Petitioners' request indicates the complexity of the facts that were to be considered. Thus, the opportunity given to the Michigan Supreme Court was to consider a legal question that was far too complex to consider without a factual development. That factual development is now being pursued in the Ingham County Circuit Court, as set forth in the Opinion of the Honorable Carolyn Stell appearing in the Appendix of Respondents.

On the other hand, the question presented to the Michigan Supreme Court in *WXYZ, supra*, was a very simple statutory construction without need of any factual background. Moreover, the Sixth Circuit Court of Appeals correctly noted that the statute was an embarrassment to those charged with its enforcement:

> "The record suggests that the potentially interested parties in Michigan, other than Judge Hand, are either not interested in saving the statute or do not think a constitutional construction is possible. The District Court invited Michigan's Attorney General and an Oakland County prosecutor to the hearing on plaintiffs' motion for a preliminary injunction and encouraged them to participate in the hearing. The Attorney General's Office failed to send a representative to the hearing. The Chief Appellate Counsel for the prosecutor's office appeared and stated: 'In a nutshell, we believe the statute is unconstitutional and that the suppression order should not have been

> ordered.' The prosecutor's office did not participate further in the proceedings."
>
> 658 F.2d. 420, at 424, n. 6.

The second reason given in *WXYZ, supra,* is really the basis for the court's decision, and that is:

> "Second, we simply do not believe that this is a proper case for abstention. . . ."
>
> 658 F.2d. 420, at 425.

Abstention was inappropriate because the statute was unconstitutional on its face, having failed to provide for a judicial inquiry into the need for a suppression order. There were no ambiguities in the statute involved in *WXYZ*. The Sixth Circuit Court of Appeals stated:

> "The terms of M.C.L.A. § 750.520k are unambiguous; they leave no room for a construction which would require judicial inquiry into the need for a suppression order in a given case. As a result, abstention is inappropriate notwithstanding the absence of an authoritative interpretation of the statute by the Michigan Supreme Court."
>
> 658 F.2d. 420, at 425.

The same cannot be said for the case before this Court. This is a case which clearly requires the interpretation of ambiguous state laws and the state constitution. Here, an authoritative interpretation of the statutes and the Michigan Constitution would be important in the consideration of any possible federal constitutional rights. In *WXYZ, supra,* there could be no conceivable interpretation which would justify a finding of constitutionality of the state statute.

In this case, the Sixth Court of Appeals found to be without merit the Petitioners' contention that the Michigan Supreme Court's failure to resolve the certified questions required the district court to exercise jurisdiction. The Sixth Circuit Court of Appeals concluded in their Opinion (7a):

> ". . . The Michigan Supreme Court's refusal to consider the questions submitted by the district court is not determinative of the decision to abstain in this case. At the time of certification, several unresolved factual disputes over how the Fund operated, precluded issuance of a cogent ruling on the Fund's status. As those disputes are currently under consideration in the Ingham County Circuit Court, on appeal the Michigan Supreme Court will have the benefit of a clear factual record with which to resolve the dispute over the Fund's statute. . . ."

The Michigan Supreme Court should not be expected to issue what is tantamount to a summary judgment concerning the law when 826 contradictory pages of appendix accompany the certified questions. Therefore, assuming that the federal district court possessed the jurisdiction to consider the claims set forth in the complaint, abstention under the *Pullman* doctrine was warranted and prudent.

B. Burford Abstention.

The District Court's Opinion with regard to abstention under the *Burford* doctrine is concise and accurate. The District Court (at 48a-49a) correctly observes:

> ". . . The potential ramifications of a ruling on those issues are great. Indeed, it is conceivable that the overall nature of the worker's compensation insurance industry in the State of Michigan could be altered. . . ."

This case easily meets the test of *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25; 79 S.Ct. 1070; 3 L.Ed.2d 1058 (1958), because it involves difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of this case. The entire future of the operation of the State Accident Fund and the workers compensation system in Michigan is at stake. The decision of the issues in this case will constitute the basis for all future cases dealing with the control and operation of the State Accident Fund and its impact on the provision of workers compensation insurance within the State of Michigan. It is one of the three remaining legs of the original four-legged stool upon which all workers compensation insurance must rest. If this leg is weakened, the state's entire policy on providing workers compensation would tumble.

As required, the state law in this case is not settled and questions bearing on state policy are presented for decision. The exercise of federal jurisdiction here would interrupt the state's effort to effect its policy respecting the provision of workers compensation within the State of Michigan. Thus, all of the tests for *Burford* set forth in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800; 96 S.Ct. 1236; 47 L.Ed.2d 483 (1976), have been fulfilled.

Additionally in this case, all of the parties are located in Ingham County. The State Accident Fund is located in Lansing at the seat of government of the state. The employees and state officers work in Lansing and the two advisory board members hold their meeting with regard to the State Accident Fund in Lansing. Lansing is not only the site of all the parties, it is also the site where all the alleged wrongdoing occurred. The statutes concerning jurisdiction and venue would all require the action to be brought in Ingham County.

The Ingham County Circuit Court is also important for another reason, for as the District Court stated ". . . This Court has been petitioned numerous times, during the course of these proceedings, to intercede in a variety of disputes between the Commissioner and the Fund. . . ." (49a) All the disputes arise and all the disputants and their attorneys reside in Ingham County. It is inconvenient for all parties to carry disputes to Kalamazoo and it is equally inconvenient to supervise a State fund located in Lansing from Kalamazoo.

Logically, then, the *Burford* doctrine and sound judicial administration would have permitted the Sixth Circuit Court of Appeals to abstain on both *Pullman* and *Burford* grounds. This would have permitted the Court to affirm the District Court judgment and the dismissal of the entire cause. In its discretion, the Sixth Circuit Court of Appeals chose to abstain only on *Pullman* grounds and to retain jurisdiction as to ERISA claims of the remaining Petitioners. This exercise of discretion cannot be termed to be arbitrary and capricious. Moreover, it cannot be deemed to be a violation of the *Pullman* doctrine cases because the Court did not dismiss the cause; it retained jurisdiction of the unresolved claims of the Petitioners.

RELIEF REQUESTED

Respondents respectfully request that the writ be denied.

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Harry G. Iwasko, Jr.
Assistant Attorney General

Attorneys for Respondents

740 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1160

Dated: November 14, 1985

No. 85-626

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, § 1, 1915 CL 5477, et al

Petitioners,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, et al

Respondents.

APPENDIX
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
BRIEF IN OPPOSITION

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Harry G. Iwasko, Jr.
Assistant Attorney General

Attorneys for Respondents

740 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1160

TABLE OF CONTENTS

Page

Ingham County Circuit Court Opinion, Honorable Carolyn Stell, in the case of *Nancy A. Baerwaldt, et al* v. *Advisory Board of the Michigan State Accident Fund, et al*, File No. 84-52547-AZ, dated May 14, 1985 ..... 1a

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

HONORABLE CAROLYN STELL

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan; JOHN HUENI, JR., Personnel Director of the Civil Service Commission, On Behalf of the Civil Service Commission; ELIZABETH P. HOWE, Director of the Department of Licensing and Regulation, v Plaintiffs, ADVISORY BOARD OF THE MICHIGAN STATE ACCIDENT FUND; JOLLIE N. ALLEN, RAYMOND C. ALSTROM, WILLIAM K. CARPENTER, DAVID J. FARROW, DONALD A. FRAZA, RUSSELL JAMESON, ROBERT E. KLINTWORTH, JR., HOWARD J. McALEER, HENRY A. MOLLICONE, E. ALLAN MORROW, GERALD J. OSTERMAN, MILFORD E. WOODBECK and PHILIP G. WILLIAMS, Each individually and as members of the Michigan State Accident Fund Advisory Board; FLOYD W. LUGINBILL, Purported Manager of the Michigan State Accident Fund, and FRANK J. NERAT, JR., Purported Attorney and Agent for the Advisory Board and Michigan State Accident Fund, Defendants.	File No. 84-52547-AZ

OPINION AND ORDER OF THE COURT

This case was commenced by the July 20, 1984 filing of the complaint of plaintiff Commissioner of Insurance (Commissioner) and other state officials for injunctive, declaratory and other relief. It is currently before the Court on plaintiffs' motion for summary judgment under GCR 1963, 117.2(2) and (3) filed August 24, 1984. Defendants Advisory Board of the Michigan State Accident Fund, individual members of the Advisory Board, manager and attorney answered the motion and filed a brief in opposition on September 21, 1984. Plaintiffs replied to defendants' brief on September 28, 1984, and defendants filed a supplemental brief November 26, 1984. Oral argument was waived, as confirmed by defendants' letter of December 7, 1984.

By consent order of July 24, 1984, the operation of the Michigan State Accident Fund (Fund), which may be subjected to substantial modification as a result of this litigation, was effectively continued in status quo by this Court in the exercise of her equitable jurisdiction. Because this decision, while it disposes of the legal issues presented by this motion, does not resolve all of the issues in the case and does not solve the problems which necessitated the consent order, that order is not modified by this opinion and order and remains in full force and effect until further order of this Court.

Plaintiffs' motion for summary judgment under Rules 117.2(2) and (3) requests judgment by this Court as a matter of law that:

I. The Commissioner has supervisory and administrative control of the Fund.

II. For purposes of Const 1963, art 11, §5, the Fund is a state agency and is subject to the jurisdiction of the Civil Service Commission.

Numerous subsidiary declarations of law as to each of these propositions were included in the motion. For the reasons explained below, the Court will grant the motion as to the Commissioner's control of the Fund to the extent specified below, but will deny the motion as to the state agency question.

Supervisory and Administrative Control

Rule 117.2(2)

The standard of review for a motion brought pursuant to Rule 117.2(2) is set forth in *Bob* v *Holmes*, 78 Mich App 205, 210-211; 259 NW2d 427 (1977):

> "A motion for summary judgment granted on the failure to state a valid defense tests the legal sufficiency of the pleaded defense. Such motion is tested by reference to the pleadings alone. *Durant v Stahlin*, 375 Mich 628, 644; 135 NW2d 392 (1965), *Todd v Biglow*, 51 Mich App 346, 349; 214 NW2d 733 (1974), *lev den*, 391 Mich 816 (1974). All well-pleaded allegations must be accepted as true. *Minor-Dietiker v Mary Jane Stores of Michigan, Inc*, 2 Mich App 585, 588; 141 NW2d 342 (1966). Drawing from the standard used for failure to state a claim, we believe the proper test for such a motion would be whether defendants' defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiffs' right to recovery. *Crowther v Ross Chemical & Mfg Co*, 42 Mich App 426, 431, 202 NW2d 577 (1972)."

The statutory provisions governing creation and operation of the Fund are now found at MCL 418.701-755; MSA 17.237 (701)-(755). The rules of statutory construction are set forth in *In re: Certified Questions, Karl* v *Bryant Air Conditioning Co*, 416 Mich 558, 567 (1982):

> "The most important rule, of course, is to discover and give effect to the legislative intent. [Citations omitted]
>
> "The next rule is to derive the legislative intention from the actual language used in the statute. [Citation omitted] If the language used is clear and the meaning of the words chosen is unambiguous, a commonsense reading of the provision will suffice, and no interpretation is necessary. [Citations omitted]."

This Court's task is to give effect to the plain meaning of the language chosen by the Legislature. *Owendale-Gagetown School District* v *State Board of Education*, 413 Mich 1 (1982).

The Court has read the statute, and the provisions thereof clearly and unambiguously vest the Commissioner with supervisory and administrative control of the Fund to the following extent:

1. The Commissioner is the administrator of the Fund, MCL 418.701; MSA 17.237(701):

> "*An accident fund is created* to provide workmen's compensation insurance for employers *under the supervision of the commissioner* * * *" (Emphasis added)

MCL 418.735; MSA 17.237(735):

> "The books, records and payrolls of each employer insured by the accident fund shall always be open to inspection by the *commissioner* or his duly authorized agent or representative for the purpose of ascertaining the correctness of the amount of the payroll reported, the number of men employed and such other information as the *commissioner* may require in the *administration* of the accident fund. * * *" (Emphasis added)

MCL 418.741; MSA 17.237(741):

> "The *commissioner* shall keep complete records of all business transacted by him in the *administration* of the accident fund. He may employ such deputies and assistants and clerical help as may be necessary and as the advisory board may authorize, for the proper *administration* of the accident fund *and the performance of the duties imposed upon him* by the provisions of this act, at such compensation as may be fixed by the advisory board and may also remove them. The *commissioner* and the deputies and assistants shall be entitled to receive their actual and necessary expenses while traveling upon the business of the accident fund. All salaries and expenses shall be charged to and paid out of the accident fund. The *commissioner* shall include in his annual report a full and correct statement of the *administration* of the accident fund, showing its financial status and outstanding obligations, the claims contested and why and general statistics in respect to it." (Emphasis added)

2. The Commissioner may employ deputies, assistants and clerical help as may be necessary and as the Fund Advisory Board may authorize. Employment shall be at such compensation as may be fixed by the advisory board. §741, *supra*. The Commissioner may remove all such employees. §741, *supra*.

3. The Commissioner and the State Treasurer may invest and retain the monies of the Fund in excess of a sufficient amount of cash to pay current losses and expenses in securities as are specified by law for investment by casualty insurance companies and in accordance with rules and conditions as set forth by them. MCL 418.705; MSA 17.237(705):

> "There shall be maintained in the accident fund a sufficient amount of cash to pay current losses and expenses

> and the balance may be *invested by the commissioner and the state treasurer* acting together, in such securities as are specified by law for investment by casualty insurance companies. All securities shall be purchased and may be sold at such time, in such manner and *in accordance with such rules and conditions* as may be prescribed by the joint action of *the commissioner and the state treasurer*. ° ° °" (Emphasis added)

See also MCL 21.101a; MSA 3.606(1a).

4. The Commissioner may readjust premiums and assessments as necessary to make the Fund self-supporting. MCL 418.711; MSA 17.237(711):

> "The accident fund shall be neither more nor less than self-supporting and the premiums or assessments levied for such purpose shall be subject to readjustment by the *commissioner* as may become necessary." (Emphasis added)

5. The Commissioner may establish the rating classification system for the employer members, the amount of premiums or assessments payable by the employer members, may change that amount as conditions of the employers' places of business with regard to safety may justify, and may prescribe when and in what manner the premiums and assessments shall be paid. MCL 418.715; MSA 17.237(715):

> "The *commissioner* may classify the establishments or works of such employers in groups in accordance with the nature of the business in which they are engaged and the probable risk of injury to their employees under existing conditions. He shall determine the amount of the premiums or assessments which employers shall pay the accident fund, may prescribe when and in what manner the pre-

> miums and assessments shall be paid, may change the amount thereof in respect to any or all of such employers as circumstances may require and the condition of the respective plants, establishments or places of work in respect to the safety of their employees may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable and just as among such employers." (Emphasis added)

6. The Commissioner has the duty and responsibility for promulgating rules concerning insurance, compliance with which will require that an applying employer be provided insurance by the Fund. MCL 718.725; MSA 17.237(725):

> "Every employer requesting insurance in the accident fund, upon complying with the *rules* concerning the insurance *adopted by the commissioner*, shall be furnished with a certificate showing the date on which the insurance becomes effective. * * *" (Emphasis added)

7. The Commissioner has authority to inspect the books, records and payroll of each insured employer for the purpose of ascertaining the correctness of the amount of the payroll reported, persons employed and other purposes as the Commissioner may require in the administration of the Fund. Employers must submit statements of their payroll to the Commissioner. MCL 418.735; MSA 17.237(735):

> "The books, records and payrolls of each employer insured by the accident fund shall always be *open to inspection by the commissioner* or his duly authorized agent or representative for the purpose of ascertaining the correctness of the amount of the payroll reported, the number of men employed and such other information as the commissioner may require in the administration of the accident fund. Refusal on the part of any employer to submit

> books, records and payrolls for inspection shall subject the offending employer to a penalty of $50.00 for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who personally gives the refusal is guilty of a misdemeanor. Any employer who knowingly submits to the commissioner a false statement of payroll for the purpose of securing a lower premium charge is guilty of a misdemeanor and shall be fined not less than $100.00 or imprisoned for not more than 30 days in the county jail, or both." (Emphasis added)

8. The Commissioner must keep complete records of all business transacted by the Commissioner in the administration of the Fund. §741, *supra.*

9. The Commissioner shall include in the Commissioner's annual report (see MCL 500.238; MSA 24.1238) a full and correct statement of the administration of the Fund, showing its financial status and outstanding obligations, the claims contested and why, and general statistics in respect to the Fund. §741, *supra.*

10. The Commissioner may determine that it is necessary to dissolve the Fund. MCL 418.751; MSA 17.237(751):

> "If this chapter is repealed, or if in the *judgment of the commissioner* it becomes necessary *to dissolve* the accident fund, all moneys which are in the accident fund at such time shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard to the obligation incurred and existing to pay compensation under the provisions of this act." (Emphasis added)

11. The Commissioner shall call the annual meeting of the employer insureds. MCL 418.755; MSA 17.237(755) provides:

> "An annual *meeting* of the employer-members of the accident fund shall be *called by the commissioner* in Lansing in October, which may be attended by the members in person or by a representative. * * *" (Emphasis added)

In light of the unambiguous statutory language specifying the eleven duties relating to the supervisory and administrative responsibility of the Commissioner, defendants' defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiffs' requested declaratory ruling on this issue. Summary judgment under GCR 1963, 117.2(2) should be granted.

Rule 117.2(3)

Having decided the motion on the above analysis, it follows that no facts may be discovered to change the law as it was passed by the Legislature. Therefore, further discovery could not uncover factual support for the litigant's position and summary judgment under GCR 1963, 117.2(3) should be granted even though discovery is not complete. *Crider* v *Borg*, 109 Mich App 771, 772-773; 312 NW2d 156 (1981).

State Agency

Rule 117.2(3)

The standard for reviewing a motion brought pursuant to this subrule is set forth in *Huff* v *Ford Motor Co*, 127 Mich App 287, 293; 338 NW2d 387 (1983):

> "A motion for summary judgment premised upon the ground that there is no genuine issue as to any material fact, GCR 1963, 117.2(3), requires the trial court to review the entire record to determine whether the non-moving party has discovered facts to support the claim or defense. The trial court is obligated to look beyond the pleadings and consider affidavits, depositions, and interrogatories. Based upon the entire record, the trial court must give the benefit of any reasonable doubt to the opposing party in determining whether there is a genuine issue as to a material fact. *Rizzo v Kretschmer*, 389 Mich 363, 371-372; 207 NW2d 316 (1973). Before judgment may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. *Partrich v Muscat*, 84 Mich App 724; 270 NW2d 506 (1978); *Fry v Ionia Sentinel-Standard*, 101 Mich App 725; 300 NW2d 687 (1980)."

Unlike the previous issue concerning the Commissioner's supervisory and administrative control of the Fund, the resolution of the "state agency" issue is not readily decided by reference to the statute, with application of the usual rules of statutory construction. For example, while the determination of "state agency" status for purposes of Const 1963, art 11, §5 was not before the Court in *Hanselman* v *Wayne County Concealed Weapon Licensing Board*, 419 Mich 168, 184 (1984), an analogous question of whether the Licensing Board was a state board for purposes of the Administrative Procedures Act was decided. The Court adopted the following analysis from *Advisory Opinion Re Constitutionality of PA 1966, No 346*, 380 Mich 554, 571 (1968):

> " 'We must * * * look behind the name to the thing named. We must examine its character, its relations, and its functions to determine, indeed, whether it is an agency or instrumentality of state government.' "

Plaintiffs claim that the Fund's character, relations and functions are determinable from the statute and require a finding that it is a state agency for purposes of Const 1963, art 11, §5. In contradistinction to the statutes regarding the Commissioner's supervisory and administrative duties, the Court finds no conclusive statutory provisions that mandate a finding that the Fund is a state agency for the constitutional purpose proffered. When the statutory language is not clear and unambiguous, the Court must look to other means of establishing legislative intent. Such indicia of legislative intent may include the administrative and executive construction of the relevant statutes, along with legislative acquiescence (through inaction). An evidentiary hearing is required. *Cf.* issues addressed by testimony in *State Bar of Michigan* v *City of Lansing*, 361 Mich 185, 188-190 (1960).

This Court, in looking at the character of the Fund, its relations and its functions can not say that evidence may not be presented at trial which would support defendants' position that the Fund is not a state agency for Const 1963, art 11, §5. The fact that discovery is still pending which may bring to light new evidence on this disputed issue makes a grant of summary judgment under Rule 117.2(3) premature at this time. *Kortas* v *Thunderbowl Lounge*, 120 Mich App 84, 87; 327 NW2d 401 (1982); *Goldman* v *Loubella Extendables*, 91 Mich App 212; 238 NW2d 695 (1979).

Nor does the supervisory and administrative authority over the Fund which this Court has declared as abiding in the Commissioner require a finding that the Fund is a state agency. Even cases cited by Plaintiffs support the concept that an entity may be a state agency for some purpose, e.g. exemption from taxation, without being subject to Const 1963, art 11, §5. See *State Bar of Michigan* v *City of Lansing*, *supra*, 194, 197-198. (The Court takes judicial notice that employees of the State Bar are not Civil Service employees.)

Summary judgment will be denied without prejudice.

Rule 117.2(2)

Defendants have denied that they are a state agency for purposes of Const 1963, art 11, §5. Since the Court has found that the issue can not be determined by applying the rules of statutory construction, such a denial is sufficient to defeat a motion brought under Rule 117.2(2). *Hanon* v *Barber*, 99 Mich App 851; 298 NW2d 866 (1980). Summary judgment will be denied.

ORDER

For the reasons set forth in this Opinion, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment under GCR 1963, 117.2(2) and (3) for declaratory judgment that the Commissioner has supervisory and administrative control of the Fund is GRANTED in part as follows:

The Commissioner has supervisory and administrative control of the Fund to the following extent:

a. The Commissioner is the administrator of the Fund.

b. The Commissioner may employ deputies, assistants and clerical help as may be necessary and as the Fund Advisory Board may authorize. Employment may be at such compensation as may be fixed by the Advisory Board. The Commissioner may remove all such employees.

c. The Commissioner and the State Treasurer may invest and retain the monies of the Fund in excess of a sufficient amount of cash to pay current losses and expenses in securities

as are specified by law for investment by casualty insurance companies and in accordance with rules and conditions as set forth by them.

d. The Commissioner may readjust premiums and assessments as necessary to make the Fund self-supporting.

e. The Commissioner may establish the rating classification system for the employer members, the amount of premiums or assessments payable by the employer members, may change that amount as conditions of the employers' places of business may justify, and may prescribe when and in what manner premiums and assessments shall be paid.

f. The Commissioner has the duty and responsibility for promulgating rules concerning insurance, compliance with which will require that an applying employer be provided insurance by the Fund.

g. The Commissioner has the authority to inspect the books, records and payroll of each insured employer. Employers are to submit statements of their payroll to the Commissioner for the purpose of ascertaining the correctness of the amount of payroll, persons employed, and other purposes as the Commissioner may require in the administration of the Fund.

h. The Commissioner must keep complete records of all business transacted by the Commissioner in the administration of the Fund.

i. The Commissioner shall include in the Commissioner's annual report a full and correct statement of the administration of the Fund, showing its financial status and outstanding obligations, the claims contested and why, and general statistics with respect to the Fund.

j. The Commissioner may determine that it is necessary to dissolve the Fund.

k. The Commissioner shall call the annual meeting of the employer insureds.

The remainder of plaintiffs' motion on this issue is DENIED.

2. Plaintiffs motion for summary judgment under GCR 1963, 117.2(2) and (3) that the Fund is a state agency for purposes of Const 1963, art 11, §5 and is subject to the jurisdiction of the Civil Service Commission is DENIED. The denial under Rule 117.2(3) is without prejudice.

3. The consent order of July 24, 1984 shall remain in full force and effect until further order of this Court.

Dated: May 14, 1985

Carolyn Stell /s/
CAROLYN STELL, Circuit Judge